(6)

No. 99-1238

Supreme Court, U.S.
FILED
JUN 22 2000
CLERK

IN THE

Supreme Court of the United States

CHRISTOPHER ARTUZ, Superintendent,
Greenhaven Correctional Facility,

Petitioner,

—v.—

TONY BRUCE BENNETT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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June 22, 2000

PETITION FOR CERTIORARI FILED JANUARY 24, 2000
CERTIORARI GRANTED APRIL 17, 2000

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT NEW YORK

DOCKET ENTRIES FOR DKT. NO. 98-CV-1274

2/20/98	Motion by Tony Bruce Bennett to proceed in forma pauperis, (ac)
2/20/98	PETITION for writ of habeas corpus; by Tony Bruce Bennett (ac)
2/20/98	MOTION by Tony Bruce Bennett for appointment of counsel.
2/20/98	Magistrate Caden has been selected by random selection to handle any matters that may be referred in this case. (ac)
3/6/98	LETTER dated 3.4.98 from Tony Bennett to Ms. Silber requesting that the Pro Se office furnish him with the necessary paperwork to appeal the Court's order denying his 2255. (tdh) [Entry date 03/09/98]
3/12/98	ORDER that the [2-1] petition is dismissed. (Signed by Judge Nina Gershon, dated: 2.25.98). (tdh)
3/25/98	Case closed. See Doc. No. 5. (tv)
3/25/98	JUDGMENT for Christopher Artuz against Tony Bruce Bennett, that petitioner take nothing of respondent; and, that the petition for a writ of habeas corpus is dismissed. () (aj1)

4/3/98	LETTER dated 3/31/98 from T. Bennett, to Ms. Volk, requesting information as to whether the court received his appeal. **Pro Se sent docket sheet. (mrm) [Entry date 04/06/98]
4/6/98	LETTER dated 4.2.98 from Tony Bennett to Mr. Heinemann inquiring about the status of his certificate of appealability. (Pro Se sent docket sheet). (tdh) [Entry date 04/08/98]
4/13/98	Notice of Appeal and certified copy of docket to USCA: [9-1] appeal (lizv) [Entry date 04/23/98]
4/13/98	NOTICE OF APPEAL by Tony Bruce Bennett Notice of Appeal and certified copy of docket sent appealing [6-1] judgment order, [5-1] order. IFP and Certificate of Appealability pending-Chambers notified. Service made by clerk. (lizv) [Entry date 04/23/98]
5/14/98	Certificate of Appealability granted; In Forma Pauperis on appeal granted as to Tony Bennett (signed by Judge Nina Gershon on 5/13/98). (lizv) [Entry date 05/15/98]
5/15/98	Certified and transmitted record on appeal to U.S. Court of Appeals: [9-1] appeal. This record consists of doc# 1-10. PLEASE NOTE: PETITION DISMISS-TIME BARRED; NO STATE COURT RECORDS. Acknowledgment requested. (lizv)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

DOCKET ENTRIES FOR DKT. NO. 98-2452

5/18/98	Copy of notice of appeal and district court docket entries on behalf of Appellant Tony Bruce Bennett filed. (COAGR state - hc ; fee ifp) [98-2452] (1134)
5/18/98	Note: This appeal was PRO SE when filed. (1135)
5/18/98	Copy of district court order dismissing a writ of habeas corpus endorsed by Hon. Nina Gershon, dated 2/25/98, FILED. (1135)
5/18/98	Copy of district court Judgment for respondent against petitioner that petitioner take nothing of respondent and dismissing a petition for a writ of habeas corpus endorsed by Clerk of Court Robert C. Heinemann, dated 3/13/98, FILED. (1135)
5/18/98	Copy of district court order granting coa and ifp endorsed by Hon. Nina Gershon, dated 5/13/98 endorsed filed. (1135)
5/18/98	Record on appeal filed. (Original papers of district court.) Number of volumes: 1 (1135)
5/20/98	Letter requesting State Court proceedings and transcripts sent to Dennis C. Vacco for Appellee Christopher Artuz, Tony Bruce Bennett for

	Appellant Tony Bruce Bennett. State Court proceedings due on 6/1/98. (1135)
5/20/98	Letter requesting state court proceedings sent to SDNY/nyny Appeals Clerk. State Court proceedings due on 6/1/98. (pr26)
5/27/98	Order dated 5/27/98 appointing Ellen Beth Resnick, Esq. For appellant Tony Bruce Bennett pursuant to CJA filed. Voucher#: 0670562 [Copies mailed to counsel and AO] (AH) (pr26)
5/27/98	CJA voucher issued to counsel: Ellen Beth Resnick, Esq. for Tony Bruce Bennett (Voucher#: 0670562) [98-2452[(pr26)
5/27/98	Scheduling order no. 1 filed, appointing counsel: Ellen Beth Resnick, Esq. pursuant to CJA. Appellant/Pet brief joint appendix due on 7/27/98. Appellee/Respondent brief due on 8/26/98. Reply brief due on 8/10/98. Response to Anders brief due on 8/10/98. Argument as early as week of 10/12/98. (AH) (pr26)
5/27/98	Notice to counsel and appellant of cja scheduling order #1 dated 5/27/98. (pr26)
7/27/98	Appellant Tony Bruce Bennett motion to extend time to file appellant's brief FILED (w/pfs). [1225051-1] (1135)

7/29/98	Order FILED GRANTING motion for extended time [1225051-1] by Appellant Tony Bruce Bennett, endorsed on motion form dated 7/27/98. Extended appellant's brief due date is 8/25/98. Extended appellee's brief due date is 9/25/98. Extended argument week as early as 11/9/98. (1135)
7/30/98	Notice to counsel/pro se re: Order endorsed on motion granting an extention of time to file appellant's brief, dated July 30, 1998. (1135)
8/28/98	Stipulation to withdraw appeal without prejudice to reinstatement RECEIVED. (Stipulation is withdrawn without prejudice so that appellant may file motion with the district court pursuant to Rule 60 of the Federal Rules of Civil Procedure.) (pr28)
9/10/98	Letter (fax) received from John M. Castellan, dated 9/9/98 informing the Court that the Office of the Queens County District Attorney has been substituted as attorney for respondent. (pr28)
9/17/98	Order withdrawing appeal by consent without prejudice to reinstatement FILED. (SB) (pr28)
9/17/98	Certified copy of order dated 9/17/98 disposing of the appeal issued to district court. (pr28)
9/22/98	Notice to all parties of Stipulation filed on 9/17/98. (pr28)
9/22/98	Hold record until October 22, 1998. (pr28)

9/28/98	Certified copy of Stipulation withdrawing Appeal Without Prejudice receipt returned from the district court. (pr28)
2/24/99	Letter received from Ellen B. Resnick, dated 2/23/99 re: request that the appeal be reinstated and that a scheduling order issue. (pr28)
2/24/99	Papers (Affidavit to Reinstate Appeal) from Ellen B. Resnick, Esq. attorney for Appellant Tony Bruce Bennett received. (pr28)
2/24/99	Letter received from Ellen B. Resnick, Esq., dated 2/23/99 re: request that the appeal be reinstated and that a scheduling order issue. (pr28)
2/24/99	Appellant Tony Bruce Bennett motion to reinstate appeal FILED (w/pfs). [1349637-1] (pr28)
3/3/99	Order FILED GRANTING motion to reinstate appeal [1349637-1] by Appellant Tony Bruce Bennett, endorsed on motion form dated 2/24/99. (LG) (pr28)
3/4/99	Notice of all parties of Order dated 3/3/99. (pr28)

4/29/99	New CJA scheduling order number: 2 filed. New Appellant/Petitioner brief due date is 5/14/99. New appellee/respondent brief due date is 6/25/99. New response to Anders brief due date is 5/20/99. New argument week as early as 6/7/99. (pr28)
4/29/99	Notice to all parties of Scheduling Order #2 Issued. (pr28)
5/7/99	Appellant Tony Bruce Bennett defective certificate of service filed. Notice sent to party to correct by 5/14/99. (pr28)
5/21/99	Appellant Tony Bruce Bennett defective Amended Certificate of Service cured. Satisfy defective document response due. (pr28)
5/21/99	Appellant Tony Bruce Bennett brief and appendix with proof of service filed. Satisfy appellant's brief due. (pr28)
6/9/99	Appellee Christopher Artuz motion to extend time to File Appellee's Brief until July 9, 1999, FILED (w/pfs). [1414878-1] (pr28)
6/11/99	Order FILED GRANTING motion for extended time to file appellee's brief until July 9, 1999 [1414878-1] by Appellee Christopher Artuz, endorsed on motion form dated 6/9/99. Extended appellee's brief due date is 7/9/99. (SB) (pr28)

6/14/99	Notice of all parties of Order dated 6/11/99. (pr28)
7/12/99	Appellee Christopher Artuz brief filed with proof of service. (pr28)
7/12/99	Appellee Christopher Artuz brief RECEIVED. Problem: Motion to file Supplemental Appendix pending (volume I and II). (pr28)
7/12/99	Appellant Tony Bruce Bennett motion to allow Leave to Make motion out of time, to allow Leave to file supplemental appendix, FILED (w/pfs). [1438634-2] (pr28)
7/19/99	Order FILED GRANTING motion to allow leave to make motion out of time [1438634-1] by Appellant Tony Bruce Bennett, endorsed on motion form dated 7/12/99. GRANTING motion to allow leave to file Suppelemental Appendix [1438634-2] by Appellant Tony Bruce Bennett, endorsed on motion form dated 7/12/99. (SM) (pr28)
7/19/99	Appellee Christopher Artuz appendix or addendum filed. (Vol. I and II) (pr 28)
7/20/99	Notice of all parties of Order dated 7/19/99. (pr28)
7/27/99	Proposed for argument the week of 9/21/99. (ca93)
8/10/99	Set for argument on 9/24/99. [98-2452] (ca93)

8/24/99	Appellant Tony Bruce Bennett motion to allow waving Appearance at Oral Argument Due to Unavailiabity FILED (w/pfs). [1458950-1] (pr20)
9/3/99	Order FILED GRANTING motion to allow waiving the appearance at oral argument due to unavailability [1458950-1] by Appellant Tony Bruce Bennett, endorsed on motion form dated 8/24/99. (ca91)
9/8/99	Notice of counsel of the order GRANTING the motion for waiving the appearance at oral argument. (ca91)
9/24/99	Case heard before WINTER CH.J., KEARSE, MCLAUGHLIN C.JJ. (TAPE: #35) (ca95)
9/30/99	Letter received from A.D.A. Kathleen O'Leary pursuant to the Court's request for written argument on the issue of whether petitioner may successfully invoke title 28, Section 2244(d) (2) (b) of the United States Code. (pr20)
10/25/99	Judgment of the district court is REVERSE & REMANDED by published signed opinion filed. (RKW) [98-2452] (pr28)
10/25/99	Judgment filed. [Entry Date: 10/26/99] (pr28)
11/8/99	Note: The OPINION PRICE is $3.00 (rek)
11/22/99	Judgment MANDATE ISSUED. (pr28)

11/22/99	Notice of all parties of Mandate Issued on 11/22/99. (pr28)
1/20/00	Record on appeal RETURNED to lower court. No. of volumes: 1 (ref)
1/31/00	Notice of filing petition for writ of certiorari for Appellant Tony Bruce Bennett dated 1/27/00 filed. Supreme Court#: 99-1238. (pr28)
3/23/00	Affidavit of service filed by Ellen B. Resnick, Esq. in support of my request for payment on Voucher Number 0670562. (pr28)
4/21/00	Certified copy of Supreme Court order GRANTING petition for writ of certiorari [1553949-1] by Appellant Tony Bruce Bennett, endorsed on motion form dated 1/31/00 dated 4/17/00. (pr28)

To be argued by
Donald E. Gilbert

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

Indictment No.
842/83

TONY BENNETT,

Appellant.

APPELLANT'S BRIEF

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STATEMENT UNDER RULE 5531

1. The indictment in the Grand Jury was 842/83.

2. The full names of the original parties were:

The People of the State of New York
-against-
Tony Bennett - defendant

3. The action was commenced in the Supreme Court of the State of New York, Queens County.

4. The defendant was convicted after trial of the crimes of attempted murder in the first degree (2 counts), criminal possession of a weapon in the second degree, reckless endangerment in the first degree (2 counts), criminal possession of stolen property in the first degree and unauthorized use of a vehicle and he was sentenced on September 25, 1984 on each of the counts of attempted murder in the first degree to 15 years to life, on the count of criminal possession of a weapon in the second degree 5 years to fifteen years, on each of the counts of reckless endangerment in the first degree 2 1/3 years to seven years, on the count of criminal possession of stolen property in the first degree 2 1/3 years to seven and on the count of unauthorized use of a motor vehicle 1 year, all sentences to run concurrently.

5. This appeal is from the judgment rendered on September 25, 1984 convicting the appellant of the crimes of attempted murder in the first degree (2 counts), criminal possession of a weapon in the second degree, reckless endangerment in the first degree (2 counts), criminal possession of stolen property in the first degree and unauthorized use of a

motor vehicle and the sentences imposed thereon.

6. The appellant has been granted leave to appeal as a poor person on the original record. The appendix method is not being used.

PRELIMINARY STATEMENT

This is an appeal from a judgment rendered against the appellant on March 27, 1994 in the Supreme Court, Queens County, convicting the defendant after trial of the crimes of attempted murder in the first degree (2 counts), criminal possession of a weapon in the second degree, reckless endangerment in the first degree (2 counts), criminal possession of stolen property in the first degree and the unauthorized use of a motor vehicle and the sentence imposed thereon on September 25, 1984 of 15 years to life on each count of attempted murder in the first degree (2 counts), 5 to 15 years on the count of criminal possession of a weapon in the second degree, 2 1/3 to 7 years on each count of reckless endangerment in the first degree (2 counts) on the count of criminal possession of stolen property in the first degree, 2 1/3 to 7 years and on the count of unauthorized use of a motor vehicle 1 year, all sentences to run concurrently.

Timely notice of appeal was filed and this Court granted appellant leave to appeal as a poor person.

No order pursuant to C.P.L. § 460.50 is outstanding and the appellant is presently incarcerated.

STATEMENT OF FACTS

WADE HEARING

DET. DANIEL COLLINS: On February 23, 1983 he was conducting the investigation of the attempted murder of officers Perham and Cleaver (H-9).* He set up a photo array of 8 pictures for officers Perham and Cleaver to view (H-13). They were shown the photos at separate times. They picked the defendant's photo (H-14).

He then conducted a lineup with the defendant and five other men. Both officers picked #3 the defendant (H-15). Both officers said the defendant was in the back seat of the car and shot at them (H-19, 20).

He had first heard of Tony Bennett a couple of years ago (H-20). The defendant and his photo were known to him (H-22). The defendant was arrested by another officer after he had talked to him and given him the defendant's name (H-23).

He had gotten a list of names from other officers and he got their photos and put them in the array (H-24). The defendant's name was typed on the back of his photo (H-33).

Officer Perham looked at the photos for less than minute and he picked the defendant (H-34). The defendant's photo was in the same place when the array was viewed by Officer Cleaver. Officer Cleaver took less time to identify the defendant than did officer Perham (H-38).

A lineup was then held between 9:20 p.m. and 9:35 p.m.

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* (H-9) refers to hearing minutes.

(H-42). Officers Cleaver and Perham two days after the incident both said that they were not sure if they could make an identification (H-56). The description that they gave the night of the incident was the one was taller than the other and that the shorter was in the back. They were between 19 and 25 years old (H-73, 74).

OFFICER WILLARD CLEAVER: He testified that on February 23, 1983 he was assigned to the 113th Precinct (H-4). The defendant was in the rear of the car (H-8). He had never seen the defendant before the shooting (H-32). The description he gave was male black, 16 to 17 years old with short cropped hair (H-36).

At the time of the incident they were in plain clothes in an unmarked car (H-39). During the pursuit of the car the closest they got to it was three feet. The defendant fired two shots (H-41). They were ten feet away when he fired (H-42).

He and his partner returned the fire. The defendant's car then went into an embankment. When the defendant got out of the car he was 45 feet away and it was dark out (H-45). Both cars were in motion at the time the shots were fired (H-47). He couldn't see the defendant's face when he got out of the car (H-57).

OFFICER KEVIN PERHAM: He testified that when he first saw the car there were four men in the car. He had never seen the defendant before and he did not know his name (H-59). He didn't see the defendant then. They responded to another call and then came back and followed the car. At that time there were three men in the car. The car stopped and the third person got out. The car was not speeding (H-61). As they pulled up behind the car it sped away (H-63). The defendant was in the

rear and he had a gun in his left hand (H-66).

The defendant opened the rear door on the driver's side while still seated in the car and fired the gun (H-68). The defendant was thirty feet from when he exited the car. The only lighting was their headlights (H-69). The defendant ran into the woods and he lost sight of him (H-70).

He picked the defendant's picture in a few seconds (H-76). He knew that someone had been arrested when he viewed the lineup (H-78). He looked at only two pictures before he picked the defendant who was #3 (H-79). The incident occurred on February 1, 1983, after midnight (H-83).

The defendant rested on the record (H-85).

COURT'S DECISION

The Court in its decision found that the photo array was not suggestive and did not taint the subsequent lineup. The Court also found that the lineup was not suggestive or conducive to irreparable misidentification. It denied the defendant's motion to suppress the identification and held that the lineup testimony was admissible at trial. (See Court decision of January 30, 1984).

It was stipulated that the defendant had no right to possession of the car (H-17).

TRIAL

OFFICER WILLIARD CLEAVER: He testified that on January 31, 1983 he was assigned to the 113th Precinct and was

working the 5:30 p.m. to 2:00 a.m. tour (T-68).* His partner was Officer Perham (T-69). At midnight they observed a blue chevrolet parked at a gas station (T-70). There were four men in the car when they first saw it (T-71).

They received a radio run and went to the location but it was unfounded. They then went back to the blue car and they saw it heading north and they followed it. They pulled up behind the car when it stopped to let a man out. There now was the driver and one man in the rear (T-71).

When they put the red light on the car sped away and they chased it (T-75). The male in the back held up a silver revolver. He could see his face, it was the defendant (T-77). The male in the back fired two shots. He could see a profile of his face (T-78).

When the defendant got out of the car he had a gun in his hand (T-80). The incident occurred at 2:00 a.m. (T-82). On February 23rd he identified the defendant in a lineup (T-100).

He had never seen the defendant before February 1st. It was 4 to 5 minutes from the time the case started till it ended (T-106). He described the defendant as a male black, 16 or 17 years old with short cropped hair (T-111).

He admitted that he told the firearms control board that the defendant was 60 feet away when the shots were fired (T-113). He could not see the defendant's face when he got out of the car (T-116). The defendant had the gun in his rind hand however in his memo book he said that he had it in his left hand (T-118).

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* (T-68) refers to trial minutes.

He had received a communication that the car was wanted in two robberies (T-120). It was dark out and the lighting changed in the course of the case (T-133). In his report he stated that he may not be able to identify the perpetrators (T-154). The defendant was born 12/22/65 and is 21 years old (T-176).

DET. DANIEL COLLINS: He testified that he was assigned to the 105th Precinct on February 23, 1983 (T-180). He was assigned to investigate this case (T-188).

A wine bottle was found in the car. The car was dusted for prints and the defendant's prints were not found in the car (T-194). The car had been used in two holdups that night. The defendant was not described as a participant in these holdups (T-195).

On February 3rd both Officers Cleaver and Perham told him that they could not identify the perpetrators (T-199). He didn't have either of them look at mug books (T-205). Some prints were taken from the car but they did not match the defendants' (T-206). February 23rd was the first time that they went out to look for suspects (T-215).

OFFICER KEVIN PERHAM: He started work on January 31, 1983 with Officer Cleaver at about 5:30 p.m. (T-240). There were four men in the car when they first saw it (T-242).

During the chase the defendant turned around a couple of times and he saw his face (T-249). He had never seen the defendant before (T-250). He picked the defendasnt out of the lineup (T-262). He didn't notice any fog on the defendant's car windows (T-262).

DEFENDANT'S CASE

JULIAN ISHMAEL: He testified that he was 18 years old and that he had never been convicted of a crime (T-283). He knows the defendant and they had been playing basketball the morning of January 31st at the Center at P.S. 52 (T-284). They placed until 5:00 p.m. or 6:00 p.m. when the center closed (T-285). The defendant then went with him to his house (T-286).

They were drinking and watching T.V. and they finished 3/4 of a bottle (T-287). The defendant never left the house. When the defendant was leaving they heard shots, saw flashing lights and went to the corner to see what happened. They were standing there talking to a police officer and another man (T-288).

They were there about half an hour and then went back to the house. They had seen a blue car halfway down a hill (T-298). They finished the bottle and the defendant decided to sleep over and he slept in his sister's room. He got up around 7:30 a.m. and he went to school and the defendant went to work (T-290).

The defendant and Mr. Chisholm did not associate with each other (T-292).

ELIAS MAHAMED: He was presented as a witness but was not allowed to testify. The district attorney stated that he had only been served with a notice of alibi for one witness. The defense claimed that he was not an alibi witness or a character witness (T-312). He had seen the defendant and Ishmael together. The district attorney claimed that this was bolstering and nothing new (T-313).

The Court held that the defense could not use him as a witness even though the district attorney had been told a week ago that he was going to testify. The court stated that he was an alibi witness. The defense took an exception (T-314). The witness would have testified that he saw Ismael and the defendant together in the crowd at6 the end of the chase (T-315). The Court held that since no alibi notice was given he could not testify as an alibi witness (T-322).

TONY BENNETT: He testified that he was 21 years old, married and has an 18 month old daughter. He has been working for Dobbs Food Service Caterers for eight months. He has never been convicted of a crime (T-323, 324).

He had previously worked for the New York City Department of Personnel, Priority Air Freight, Darnell Fashions, Mitchum Chemists and the Triborough Bridge and Tunnel Authority. He knows Mr. Ismael and Mr. Chisholm (T-325).

He had testified for the people against Ronald Chisholm, the brother of Derrick Chisholm in 1979 because he had shot one of his friends (T-326). He and Mr. Chisholm have had seven or eight fights. They had a fight the previous Monday on the subway and they were both arrested which is why they were unable to come to Court (T-327)

He arrived at Mr. Ishmael's house before 7:00 p.m. (T-329). They were drinking wine or rum, he is not sure which (T-330). He dozed off and woke up about 11:30 p.m. (T-331). It was 20 degrees outside and he was wearing a 3/4 length coat. He is right handed. (T-332)

When they were leaving the house they heard shots. They walked to the park to see what happened (T-333). He saw

police officers crouched behind car doors with their guns drawn. He met Mr. Mahamed and talked to him. Mr. Mahamed was standing in front of his house with a bathrobe on. (T-334)

We were also talking to Officer Jenkins and we watched the police go into the weeds to search and we then went back to the house to finish the wine (T-336). This was a rare occurrence in our neighborhood. I stayed in Mr. Ismael's house that night. (T-337)

Since he had testified against Ronald Chisholm Detectives Collins and Milonesi have come to this house to ask him questions about Ronald Chisholm (T-338). Every time that they saw him they would say "what are the Chisholms doing? You know, tell me. You know come on, come on. I'm telling you, if I get the opportunity I'm going to burn them". (T-338)

Even when I was driving my car they would pull me over and ask me, they told me "all right, I got it arranged with some people out in Nassau County, right, there's some guys that have been doing some robberies." They said they would pay me $100.00 if I picked out the pictures and give them the names. (T-339)

DERRICK CHISHOLM: He testified that he was 20 years old and that he really didn't know the defendant. He only saw him in the streets (T-384). He and the defendant had three or four fist fights previously and they had a fight last week coming to Court (T-388). He was not in the car with the defendant on February 1, 1983. (T-389)

The people and the defense rested (T:404). The defendant's motion to dismiss was denied (T-408, 409)

VERDICT

The defendant Derrick Chisholm was found not guilty on all counts. (T-600)

The defendant, Tony Bennett, was found guilty of the following counts: Count one - attempted murder in the first degree; Count two - attempted murder in the first degree; Count Five - criminal possession of a weapon in the second degree; Count six - reckless endangerment in the first degree; Count seven - reckless endangerment in the first degree; Count eight - criminal possession of stolen property in the first degree, and Count nine - unauthorized use of a vehicle. (T-601, 602)

SENTENCE

A letter from Alfred Seaman was submitted, which reads as follows:

> "I, Alfred Seaman, hereby gives valid information reference to an alleged crime being committed on 1/31/82 - February 1, 1982 two police officers were allegedly shot at behind J.H.S. 231. The person who is charged with this crime is Tony Bennett which could not have been in the blue car because on this particular night, I saw Ronald Cephaus, Ricky Whitehurst, Tony Bennett, and Julian Ismael parked on Rockaway Boulevard by a gas station sitting in a car. A few months later I saw Tony and Ismael get out of the car and leave. R.C. Lil Ricky remained inside the car. A few moments later the police approached the car and R.C.

sped off and police gave chase". (S-3)*

The district attorney gave Mr. Seaman a polygraph test and it was found that his performance was highly deceptive. The district attorney then interviewed Rose Powell, the defendant's sister who told him that on 1/31/82 about 10:15 p.m. she was coming from the store and she saw Tony and Ishmael and she told Tony his wife had called. He said, "I'm going to Ishmael's house." She did not know where he was from 10:30 p.m. to 7:00 a.m. (S-5).

The Court held that there was nothing before him upon which he could grant the defendant's motion as to newly discovered evidence or Mr. Mahamed the alibi witness (S-7). The defendant still claims that he is innocent (S-9).

The Court stated that - "I am not completely satisfied that I know everything here that I should know" (S-10).

The district attorney asked the Court to impose the minimum sentence of 15 years to life before of the defendant's character and his supportive family (S-12).

The Court stated that it was "quite disturbed by the fact that the same jury found that Chisholm was not involved and Bennett was and the police were just as firmly convinced that Chisholm was as Bennett was" (S-13).

The Court sentenced the defendant on two counts of attempted murder in the first degree to 15 years to life on each count. On the count of criminal possession of a weapon in the second degree 5 to 15 years. On the two counts of reckless

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* (S-3) refers to sentence minutes

endangerment in the first degree 2 1/3 to 7 years on each count. On the count of criminal possession of stolen property in the first degree 2 1/3 to 7 years and on the count of unauthorized use of a motor vehicle 1 year. All sentences to run concurrently.

POINT I

THE COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO ALLOW MR. ELIAS MAHAMED TO TESTIFY FOR THE DEFENSE BECAUSE TIMELY NOTICE OF ALIBI WAS NOT SERVED.

Mr. Elias Mahamed was presented as a witness for the defense but he was not allowed to testify. The district attorney stated that he had only been served with a notice of alibi for one witness.

The defense claimed that he was not an alibi witness or a character witness (T-312). He would testify that he had seen the defendant and Ishmael together the night of the crime. The district attorney claimed that this was bolstering and nothing new (T-313).

The Court held that the defense could not use him as a witness even though the district attorney had been told a week ago that he was going to testify. The Court stated that he was an alibi witness. The defense took exception (T-314).

The witness would have testified that he saw Ishmael and the defendant together in the crowd at the end of the chase (T-315). However, the Court held that since no alibi notice was given he could not testify as an alibi witness (T-322).

This witnesses' testimony was crucial to the defense especially in view of the fact that both Mr. Ishmael and the defendant testified that they were together in the crowd. His testimony, if it had been admitted, could well have changed the jury verdict from guilty to not guilty.

The district attorney had known a week ago that the defense was going to call him as a witness. There was no surprise or prejudice to the district attorney. The People made no application for an adjournment. The witness was kept on call until the next day, if the People wished to question him or to call him as their witness (T-365-367). The People failed to do so.

Permitting an unlisited alibi witness to testify where, arguably, he is not an alibi witness is in accord with the long established rule that statutes which infringe on fundamental rights must be narrowly construed. See Smith v. United States, 360 U.S. 1; People v. Trowbridge, 305 N.Y. 471; People ex rel. Cosgriff v. Craig, 195 N.Y. 190.

Refusal to permit defendant's witness to testify violated his constitutional right to call witnesses in the presentation of his defense. People v. Cuevas, 67 A.D.2d 219; Chambers v. Mississippi, 410 U.S. 284; In re Oliver, 333 U.S. 257; People v. Foy, 32 N.Y.2d 473.

C.P.L. § 250.20(3) allows the Court in its discretion to receive testimony where an alibi notice was not given. The Court must grant the People upon application an adjournment of up to three days. The Court should have followed this statutory provision and its failure to do so constituted reversible error especially where the district attorney knew a week ago that the witness would be called and the People requested no adjournment.

The Court should not refuse to permit an alibi witness to testify before he was not named in the notice of alibi as a sanction for defendant's failure to comply with the statute. People v. Morales, 43 A.D.2d 917 aff'd, 37 N.Y.2d 262. In the absence of a showing of undue prejudice to the People the failure to make timely notice is not a fatal defect. People v. Peterson, 96 A.D.2d 871.

There was no showing of surprise or undue prejudice to the People and the People did not request an adjournment. In view of these facts the Court's refusal to let the witness testify was an abuse of discretion which constituted reversible error.

The judgment of conviction should be reversed and a new trial ordered.

POINT II

THE JUDGMENT OF CONVICTION MUST BE REVERSED BECAUSE THE PEOPLE FAILED TO PROVE THE DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

At the Wade hearing, Detective Collins testified that wo days after the incident both Officer Cleaver and Officer Perham told him that they were not sure if they could make an identification (H-56). The description that they gave the night of the incident was that one was taller than the other and that the shooter was in the back. They were between 19 and 25 years old (H-73, 74).

Officer Cleaver had never seen the defendant before the shooting (H-32). The description he gave was male black 16 to 17 years old with short cropped hair (H-36), (T-111). The

perpetrator was 45 feet away when he got out of the car and it was dark out (H-45). He told the firearms control board that the defendant was 60 feet away when the shots were fired (T-113). In his report he stated that he may not be able to identify the perpetrators (T-154). He couldn't see the perpetrator's face (H-57).

Officer Perham had never seen the defendants before (H-59). The defendant was in the rear of the car and he had a gun in his left hand (H-66). At the trial Officer Cleaver stated that the defendant had the gun in his right hand however in his memo book he said that he had it in his left hand (T-118).

The car chase lasted 4 to 5 minutes (T-106) and it occurred at 2:00 a.m. (T-82). The distance between the cars and the lighting varied during the chase which went around several corners (T-133).

A wine bottle was found in the car. The car was dusted for prints and the defendant's prints were not found in the car (T-194). Although some prints were taken from the car (T-206). The car was used in two holdups that night but the defendant was not described as a participant in these holdups (T-195).

Mr. Ishmael who testified for the defense stated that he was 18 years old and had never been convicted of a crime (T-283). The defendant was with him playing basketball on January 31st. They then went to house and they stayed there drinking and watching T.V. (T-287).

When the defendant was leaving they heard shots, saw flashing lights and went to the corner to see what happened. They stood there talking to a police officer and another man (T-

288). About a half hour later they went back to the house (T-289). They finished the bottle and the defendant stayed over and he never left. They got up at 7:30 a.m. and he went to school and the defendant went to work (T-290).

The defendant and Mr. Chisholm did not associate with each other (T-292). The People in no way controverted his testimony.

The defendant who testified in his own behalf stated that he was 21 years old, married and had no 18 month old daughter and was gainfully employed (T-323, 324).

He had testified for the People against Ronald Chisholm, the brother of Derrick Chisholm in 1979 because he had shot one of his friends (T-326). He and Mr. Chisholm have had seven or eight fights. They had a fight the previous Monday on the subway and they were both arrested which is why they were unable to come to court (T-327).

He arrived at Mr. Ishmael's house before 7:00 p.m. (T-329). He is right handed (T-332). When they were leaving the house they heard shots. They walked to the park to see what happened (T-333). He met Mr. Mahamed and talked to him (T-334).

He also spoke to Officer Jenkins. They then went back to the ho use (T-336). He stayed in Mr. Ishmael's house that night (T-337).

Derrick Chisholm testified that he really didn't know the defendant. He only saw him in the streets (T-384). He and the defendant had three or four fist fights previously and they had a fight last week coming to Court (T-338). Mr. Chisholm was

found not guilty on all counts (T-600).

The court itself had some doubts as shown by the following statements made by the Court at the sentencing:

> "I am not completely satisfied that I know everything here that I should know" (S-10).
>
> "Quite disturbed by the fact that the same jury found that Chisholm was not involved and Bennett was the police were just as firmly convinced that Chisholm was as Bennett was" (S-13).

The defendant still claims that he is innocent (S-9). The description of the perpetrator by the police was a male black 16 years old (T-111). The defendant was 21 years old and taller. The jacket found in the back of the car was too large for the defendant.

The incident occurred on February 1st at about 2:00 a.m. On a cold February night the rear windows of the car would have fogging on them obscuring the identity of the occupants. In view of this and the fact that it was dark the police could not have identified the defendant. Although fingerprints were found in the car they were not the defendant's prints.

There clearly was a reasonable doubt as to the defendant's guilt and the jury's failure to resolve this doubt in the defendant's favor constituted reversible error.

C.P.L. § 70.20 provides that no conviction of an offense by verdict is valid unless based upon trial evidence which is

legally sufficient and which establishes beyond a reasonable doubt every element of such offense and that the defendant's commission thereof.

The United States Supreme Court has held that the due process clause protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged. In re Winship, 397 U.S. 358.

The presumption of innocence means that the burden is always on the prosecution to establish the accused's guilt beyond a reasonable doubt. Richardson on Evidence 10th Ed. § 61.

The Supreme Court of the United States has defined a reasonable doubt as an actual doubt that you are conscious of after going over in your minds the entire case, giving consideration to all testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty, and believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any such matter of like importance would hesitate to act because of such doubt as you are conscious of having, that is reasonable doubt of which the defendant is entitled to have the benefit. Holt v. United States, 218 U.S. 245.

There clearly was a reasonable doubt as to the defendant's guilt and the jury verdict was in error.

The judgment of conviction should be set aside and a new trial ordered.

POINT III

THE COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED THE DEFENDANT'S C.P.L. § 330.30 MOTION TO SET ASIDE THE VERDICT BECAUSE OF NEWLY DISCOVERED EVIDENCE.

At the time of sentencing the defendant made a motion pursuant to C.P.L. § 330.30 to set aside the verdict on the grounds of newly discovered evidence.

A letter from Alfred Seaman was submitted, which reads as follows:

> "I Alfred Seaman, hereby gives valid information in reference to an alleged crime being committed on 1/31/82 - February 1, 1982 two police officers were allegedly shot at behind J.H.S. 231. The person who is charged with this crime is Mr. Tony Bennett, which could not have been in the blue car because on this particular, I saw Ronald Cephaus, Ricky Whitehurst, Tony Bennett and Julian Ishmael parked on Rockaway Boulevard by a gas station sitting in a car. A few moments later I saw Tony and Ishmael get out of the car and leave R.C. Lil Ricky remained inside the car. A few moments later the police approached the car and R.C. sped off and police gave chase" (S-3).

This newly discovered evidence would exonerate the defendant. The fact that Mr. Seaman was given a polygraph test which was not highly favorable does not in any way detract from

this evidence which the jury should have heard.

The jury should also have heard the testimony of Rose Powell that she saw the defendant on the night in question at about 10:15 p.m. and he was with Ishmael. The defendant told her that "I'm going to Ishmael's house" (S-5).

The testimony of these two people coupled with the testimony of Mr. Mahamed, if he had been allowed to testify and the testimony of the defense witnesses would clearly have caused the jury to render a verdict other than the guilty verdict.

The Court denied the defendant's motion (S-7) in spite of the fact that it was not completely satisfied that it knew everything that it should know (S-10) and that it was quite disturbed by the fact that the same jury found that Chisholm was not involved and Bennett was and the police was just as firmly convinced that Chisholm was as Bennett was (S-13).

C.P.L. § 330.30(3) provides that where new evidence has been discovered and is of such a character to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant, the Court may set aside the verdict.

There clearly were grounds, which if raised upon an appeal from a prospective judgment of conviction, would require a reversal or modification of the judgment as a matter of law. See People v. Collins, 72 A.D.2d 431. In such a case a new trial is the proper remedy. People v. Barberas, 92 A.D.2d 871.

The Court committed reversible error when it denied the motion without conducting a hearing. People v. Stokes, 83

A.D.2d 968; People v. Daniels, 48 A.D.2d 905.

The judgment of conviction should be reversed and a new trial ordered.

POINT IV

THE TWO CONVICTIONS OF ATTEMPTED MURDER IN THE FIRST DEGREE MUST BE REVERSED BECAUSE THE PEOPLE FAILED TO PROVE INTENT TO CAUSE DEATH BEYOND A REASONABLE DOUBT AND THE PEOPLE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT KNEW THEY WERE POLI CE OFFICERS.

Penal Law § 125.27(1)(a) (i) requires that there must be intent to cause death and that the defendant knew or reasonably should have known that the victim was a police officer.

At the time of the incident the police officers were in plain clothes and were in an unmarked car (H-39). The defendant and the driver could very well have thought at 2:00 a.m. that there were two men who were trying to rob them.

It was alleged that in the course of the chase the defendant fired two shots. The officers were not hit and there was no proof that the bullets even hit their car. It is conceivable that the defendant could have fired in the air only with intent to scare off his unknown pursuers which would amount to reckless endangerment in the first degree.

The People must prove the defendant's intent to kill.

People v. Hernandez, 78 A.D.2d 554. The People must also prove that the defendant knew that the intended victims was a police officer. People v. Cherry, 412 N.Y.S.2d 35.

The People failed to prove intent to kill beyond a reasonable doubt and also failed to prove that the defendant knew the victim was a police officer beyond a reasonable doubt. The convictions for attempted murder in the first degree must be reversed.

POINT V

THE COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO SUPPRESS THE IDENTIFICATION OF THE DEFENDANT.

Det Collins set up a photo array of 8 pictures for Officers Perham and Cleaver to view (H-13). They were shown the photos and they picked the defendant's photo (H-14). He then conducted a lineup with the defendant and five other men and both officers picked the defendant (H-15).

The defendant and his photo were known to him (H-22). The defendant was arrested by another officer after he had talked to him and given him the defendant's name (H-23).

Det Collins was conducting the investigation of the attempted murder of Officers Perham and Cleaver. He had heard of the defendant a couple of years ago (H-20). The defendant's name was typed on the back of his photo (H-33).

Officer Perham looked at the photos for less than a minute (H-34). The defendant's photo was in the same place

when the array was viewed by Officer Cleaver who took less time to identify the defendant than did Officer Perham (H-38).

Both officers two days after the incident stated that they were not sure that they could make an identification (H-56). The description that they gave the night of the incident was that one was taller than the other, the shooter was in the back and they were between 19 and 25 years old (H-73, 74).

Officer Cleaver who had never seen the defendant before the shooting described him as a male black, 16 to 17 years old with short cropped hair (H-36). Both cars were in motion and it was dark outside (H-45).

Officer Perham had never seen the defendant before the incident (H-59). The only lighting was their headlights, (H-69) yet he picked the defendant's picture in a few seconds (H-76) after only looking at two of the eight pictures (H-79). Prior to the time he looked at the lineup he knew that someone had already been arrested (H-78), in fact he was arrested at 6:00 p.m. and the lineup was at 9:30 p.m. The incident took place on February 1, 1983 after midnight (H-83).

The Court held that the photo array was not suggestive and that it did not taint the subsequent lineup. The Court also found the lineup was not suggestive and that the lineup testimony was admissible at trial. (See Court decision of January 30, 1984).

Officer Cleaver told the firearms control board that the defendant was 60 feet away when he fired the shots (T-113). He couldn't see the defendant's face when he got out of the car (T-116).

The photo array and the subsequent lineup were highly suggestive and tainted and therefore the lineup identification and the in court identification, which was the "fruit of the poisonous tree" should have been suppressed. There was no independent source for an in court identification.

Both officers two days after the incident admitted that they were not sure they could make an identification. It is 22 days after the incident when Detective Collins is in charge of the investigation that they can all of a sudden identify the defendant's photo and the defendant.

Det Collins had the defendant arrested hours before the identification took place. He specifically put the defendant's picture, with his name on the back in the same place in the photo array when the officers viewed it. The officer knew an arrest had been made prior to the identification which clearly put pressure on them to identify someone. All of this was highly suggestive.

It is inconceivable under the facts of the chase that the officers could have seen the defendant. The cars were traveling at high speeds and turned around a number of corners. It was dark out and it was cold and there must have been fogging of the rear window. Neither officer had seen the defendant before this incident. When the two shots were fired, which would have only taken a couple of seconds the police car was 60 feet6 away. They ducked and returned the fire. Neither one of them could see his face when he exited the car.

The identification under the circumstances was unbelievable and the photo array was suggestive and tainted, thus the subsequent lineup should have been suppressed and the Court's failure to do so constituted reversible error.

An appellate court should "refuse to credit testimony which has all appearances of having been patently tailored to nullify constitutional objections." People v. Garafolo, 44 A.D.2d 86 at 88.

The rule is that testimony which is incredible and unbelievable, that is, impossible of belief because it is manifestly untrue, physically impossible, contrary to experience, or self contradictory, is to be disregarded as being without evidentiary value, even though it is not contradicted by other testimony or evidence introduced into the case. People v. Garafolo, 44 A.D.2d 86; People v. Auletta, 88 A.D.2d 867; People v. Smith, 77 A.D.

The due process clause of Fourteenth and Fifth Amendment prohibits an identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification. Kirby v. Illinois, 406 U.S. 682; Neil v. Biggers, 409 U.S. 188; Manson v. Brithwaite, 432 U.S. 98.

The officers photo identification was suggestive, tainted and unbelievable and therefore the subsequent lineup was tainted and the admission of this evidence at trial was in violation of the defendant's constitutional rights and constitutes reversible error.

The judgment of conviction should be reversed and a new trial ordered.

APPELLANT'S POINT

POINT VI

THE SENTENCE IMPOSED WAS HARSH AND EXCESSIVE AND SHOULD BE REDUCED.

The district attorney asked that the minimum sentence be imposed (S-12). The defendant was a first offender.

The Court sentenced the defendant on the two counts of attempted murder in the first degree to 15 years to life on each count. On the count of criminal possession of a weapon in the second degree 5 to 15 years. On the two counts of reckless endangerment in the first degree 2 1/3 to 7 years, on each count. On the count of criminal possession of stolen property in the first degree 2 1/3 to 7 years and on the count of unauthorized use of a motor vehicle 1 year. All sentences to run concurrently.

The defendant was convicted of attempted murder in the first degree. This is a class B felony under Penal Law § 70.02(1)(a). It is not an armed felony as defined in C.P.L. 1.20(4). Therefore, under Penal Law § 70.02(4) the minimum sentence should have been 8 1/3 and not 15 years. People v. Lawrence, 97 A.D.2d 718.

In view of the defendant's good background and the fact that he was a first offender the minimum sentence should have been imposed.

Retribution is no longer the dominant objective of the criminal law. Zett, New York Criminal Practice Vol 6, p. 45. New York today follows the prevalent modern philosophy of

penology that the punishment should fit the offender and not merely the crime. Reformation and rehabilitation of offenders has become the important goals of criminal jurisprudence. Williams v. New York, 337 U.S. 241; People v. Scafo, 77 A.D.2d 668. The defendant's potential for rehabilitation must be considered. People v. Berghordt, 17 A.D.2d 912; People v. Masher, 24 A.D.2d 47.

The Appellate Division in the in exercise of its discretion has the power to modify or reduce an excessive sentence, People v. Record, 51 A.D.2d 677; People v. Brovender, 39 A.D.2d 587, even if legally permissible. People v. Nichols, 30 A.D.2d 635; People v. Best, 77 A.D.2d 836.

The sentence imposed was harsh and excessive and the sentence should be reduced to minimum sentence allowable by law.

CONCLUSION

1. The Court's refusal to allow Mr. Mahamed to testify for the defense because a notice of alibi was not served constituted reversible error.

2. The conviction must be reversed because the people failed to prove the defendant's guilt beyond a reasonable doubt.

3. The denial of the defendant's C.P.L. § 330.30 motion to set aside the verdict because of newly discovered evidence constituted reversible error.

4. The convictions for attempted murder must be set aside because the People failed to prove intent to cause death and knowledge that they were police officers beyond a

reasonable doubt.

5. Failure to suppress the tainted identification constituted reversible error.

6. The sentence imposed was harsh and excessive and should be reduced.

Respectfully submitted,

DONALD E. GILBERT

(EXHIBIT OMITTED)

AFFIRMATION OF MAILING

DONALD E. GILBERT, ESQ., an attorney admitted to practice in the Courts of the State of New York, and not a party to this action, under penalty of perjury says:

1. I am the attorney for Tony Bennett, the defendant-appellant in this action.

2. On the 28th day of March 1986, I served the within appellant's brief, note of issue and trial minutes upon the Hon. John Santucci, District Attorney, Queens County, attention Appeals Bureau, addressed to 125-01 Queens Boulevard, Kew Gardens, New York, by ordinary mail by giving the same in a postpaid wrapper, a proper addressed envelope in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

March 28, 1986

_____

Donald E. Gilbert

Argued by: Seymour Roth

Request: 10 Minutes

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

TONY BENNET

Defendant-Appellant.

RESPONDENT'S BRIEF

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Indictment Number 842/83
(Queens County)

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Argued by: Seymour Roth
Request: 10 Minutes

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

TONY BENNETT, :

Defendant-Appellant. :

RESPONDENT'S BRIEF

Preliminary Statement

This is an appeal from a judgment entered in the Supreme Court, Criminal Term, Queens County on September 25, 1984, convicting defendant, after a jury trial of attempted murder in the second degree (2 counts), criminal possession of a weapon in the second degree, reckless endangerment in the first degree (2 counts), criminal possession of stolen property in the first degree, and unauthorized use of from 15 to life on each of the attempted murder convictions, 5 to 15 years on the criminal possession of a weapon conviction, 2 1/3 to 7 years on each reckless endangerment conviction, 2 1/3 to 7 years on the criminal possession of stolen property conviction, and one year in the unauthorized use of a motor vehicle conviction.

Friedmann, J., at trial and sentence.

The Trial Evidence

The People's Case

Police Officer **William Cleaver** of the 113th Precinct was assigned to the anti-crime unit on the evening of January 31, 1983. He was on a 5:30 p.m. - 2:00 a.m. tour, cruising in an unmarked police vehicle with his partner, Kevin Parham. Cleaver was the driver, Perham the recorder (68-70).*

Several minutes after midnight, on February 1, 1983, Cleaver spotted a blue Chevrolet on Rockaway Boulevard with four male occupants. At that time he received a radio transmission of a "dispute with knives" and left the scene. The transmission proved unfounded, and Cleaver drove back to the scene where he had spotted the Chevrolet. On the way back, Cleaver passed the subject vehicle, which now had only three occupants. He made a U-turn and followed it. When Cleaver pulled his vehicle behind the Chevrolet another occupant exited, leaving only the driver and a rear passenger seated behind the driver. The male passenger turned around and looked at the policeman (70-74).

At that point, Cleaver put a revolving red "fireball" light on the roof of the car and turned on flashing red grill lights. The Chevrolet sped away; the police pursued. During the chase, the Chevrolet made nine turns in an effort to "shake" the police car. When Cleaver radioed the license plate of the vehicle, he learned that the vehicle was wanted in connection with "some robberies

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* Numerical references are to the pages of the trial transcript dated March 23, 1984.

in two precincts." At two points during the chase, which lasted 4-5 minutes, the occupants of the Chevrolet tried to "bail out" but the police car was too close behind. Cleaver testified: "They didn't jump." He was able to see Bennett's face on several occasions: Cleaver saw Bennett's face originally on approaching the vehicle; on two occasions when Bennett turned around and fired twice at the officers; two times when Bennett tried to "bail" out of the car; and "at the very end" of the chase. Cleaver identified the defendant in court as the male in the rear passenger seat of the Chevrolet who "fired two shots at us" (73-75, 77-78, 120, 133).

At the end of the chase, in a parking lot, at the rear of Junior High School 231, adjacent to a field, the defendant, pistol in hand, jumped out of the car and fled through the field with his companion. Before they did so, however, the police fired at them (78-81).

It was stipulated that if Martin Shapiro, a ballistics expert testified, he would state that an examination of the police vehicle showed "bullet crease" damage to its hood. Cleaver testified that before the chase there was no hood damage. An aerial photograph admitted into evidence showed that Bennett's sisters lived nearly the scene where the car chase ended (70, 178-179). The defendant himself lived in the area (323).

On February 23, 1983 Cleaver went to the 105th Precinct and identified Bennett in a lineup. He recognized Bennett as the man who was seated in the rear passenger seat of the blue Chevrolet, "the night [he] shot at us" (100, 103).

Officer **Kevin Perham's** testimony paralleled that of Cleaver's. He testified that the blue Chevrolet was spotted in a "robbery-prone location" on Rockaway Boulevard (241-242).

When the police car pulled in back of the Chevrolet, Perham was able to see Bennett's face when he turned around. He also stated that during the chase he was able to see Bennett's face "a few times" when Bennett turned around to "monitor how close we were to them." He kept turning around first to watch us, to see what we are doing." Perham also saw the defendant's face when the defendant leaned out of the door of the Chevrolet and fired twice at him. Perham returned the defendant's fire. He identified the defendant in court as the man in the rear seat of the Chevrolet he "saw on that day holding a gun." He stated that at the end of the chase he was able to see Bennett's face in the light of the police car headlight "which illuminated the area very well." When Bennett, pistol in hand, exited the car, and turned and pointed it at the police. Perham viewed a lineup at the 105th Precinct on February 22, 1983 and identified Bennett as the man who fired the pistol at them during the car chase. He said that on the night of the chase there was no fog on the back window of the Chevrolet (241-243, 249, 251-253, 262, 274).

Detective **Daniel Collins** of the 105th Precinct testified that on February 23, 1983 he conducted a lineup at the precinct. The lineup was viewed separately by Officers Cleaver and Perham From his experience and from his investigation of the course of the car chase, Collins concluded that the perpetrators were from the area. He stated that the blue Chevrolet was stolen from the 44th Precinct in the Bronx (185, 229, 238).

Defense Case

Julian Ishmael, a good friend of Bennett's, stated that on January 31, 1983 he played basketball with the defendant at P.S. 52. After the game ended (between 5:00 p.m. and 6:00 p.m.), he went home. He lived at 145-42 179th Street, Springfield Gardens. About 15 minutes after arriving home

Bennett came to his house. Ishmael testified that for the next several hours he and Bennett drank wine and watched a college basketball game on television (283-285, 287, 288A, 293). They never left the house (288A).

After the basketball game on television ended, he walked the defendant to the door, opened it, heard shots, and saw lights flashing on Conduit Boulevard. Together he and Bennett went to Springfield Park to see what was going on. When they arrived at the scene they saw the blue Chevrolet. They stayed at the scene for about thirty minutes, talked to "another guy," then returned to his house and finished the wine. Bennett slept over his house that night. This was the first time that Bennett slept over (288-290).

Tony Bennett's testimony paralleled that of his alibi witness Ishmael. He stated that while at Ishmael's house they matched drinks: "yellow rum" (230). While at the scene, at the field where the blue Chevrolet was abandoned, Bennett met a Mr. Mahamed, who was seated in court. Bennett pointed out Mahamed in court and stated that he talked to him on the night in question, in front of Mahamed's house diagonally "in front of" the field. According to Bennett, the blue Chevrolet was about 150 yards from Ishmael's house (348).

Bennett denied that he was in the blue Chevrolet on February 1, 1983 or that he fired a pistol at police officers on that date. He alleged that not only was he not an associate of co-defendant Chisholm, but that he and Chisholm had several fights since the night of the crimes. The first time they fought was on February 24, 1983, the day after the police told him that Chisholm had told them that Chisholm was the driver and he was the shooter. During one fight, at a subway station, police intervened. They each time falsely accused each other of

robbery (338, 346, 355, 357-359).

POINT ONE

THE DEFENDANT WAS PROVED OVERWHELMINGLY (Answering Defendant's Points II and IV, pp. 13-16, 19).

The defendant argues that his conviction must be reversed because the People failed to prove him guilty of attempted murder in the first degree beyond a reasonable doubt. This argument is devoid of merit.

Viewing the evidence in this case in a light most favorable to the prosecutor, any rational terir of fact could have found that the People proved its case of attempted murder in the first degree beyond a reasonable doubt. People v. Malizia, 62 NY2d 755 (1984).

The identification of the defendant Bennett, as the man in the back seat of the stolen blue Chevrolet who fired two shots at officers Cleaver and Perham during car chase was established by unequivocal credible testimony. Credibility is a matter to be determined exclusively by the trier of the facts. People v. Contes, 60 NYS 2d 620 (1985).

Both officers, Cleaver and Perham, initially saw Benett seated in the back of the car when he turned around after the pulled behind it and a few times during the chase when he turned around to "monitor how close they were to him"; when he tried to "bail" out of the car twice; when he turned around to shoot at them; and when he turned around after exiting the vehicle. Bennett's face was illuminated at times by the overheard streetlights, at times by the police headlights, and at time by a

combination of both. Supporting these observations were the in-court and line-up identifications by each officer – which were unimpeached. Also, undoubtedly, it was not lost on the jury that during the chase the police vehicle was directly behind the Chevrolet – and at times as close as three feet: The police car was "right on their bumper" (76). Notably, Perham testified inter alia that when Bennett exited the car at the end of the chase he lingered for "a few long seconds where I got a good look at him" (278). Also not lost on the jury was the fact that the eyewitnesses, i.e. Cleaver and Perham, were not ordinary witnesses. They were trained and experienced for precisely the role they played on February 1, 1983. Their objective was the detection of criminal activity and the apprehension of the perpetrators. They could be expected to make careful observations, focused all the more by their consciousness of their future need to make an in-court identification. Indeed, the expertise of trained police officers has been judicially recognized. People v. Morales, 37 NY2d 271 (1975). Contrary to Bennett's contention that Cleaver could not see his face, the record shows that Cleaver unequivocally stated he could-and he did (73-75, 77-78, 120, 133). Also, contrary to defendant's contention, Cleaver never wrote in his report that he might not be able to identify the defendant. It was Detective Collins who wrote in his (Collins) report that the officer Cleaver was not sure he could make identifications. The fact remains however, the Cleaver was able to identify Bennett and did so when he independently picked him out of a lineup of six persons and subsequently identified him in court.

The defendant's argument that the rear window on the Chevrolet "would have fogging on it obscuring the identity of the occupants" (defendant's brief p. 15) is belied by the record. Perham testified that there was no fog on the windows of the blue Chevrolet (274).

Finally, it should be noted that any inconsistencies in the People's case was resolved by the jury against the defendant Bennett. The responsibility for resolving questions relating to the credibility witnesses lies with the jury. See, People v. Malizia, supra; People v. Herriot, 110 AD2d 851 (2d Dept. 1985); People v. Morgan, 107 AD2d 718 (2d Dept. 1985) and their determination in this regard may not be overturned lightly on appeal. People v. Bigalow, 106 AD2d 448, 449-450 (2d Dept. 1984).

Matched against the credible, independent and unequivocal identification of the defendant, by the officers Cleaver and Perham was the defendant's incredible testimony and that of alibi witnesses, Ishmael. That the jury saw through their transparent tissue of falsehoods is undeniable. The defendant, presenting himself as a married man with the responsibility of a wife, child and job, allegedly played basketball with Ishmael, later went to his house, drank almost a bottle of rum with him, watched television and dozed. Ultimately, instead of going home to his family, Bennett slept over Ishmael's house. It is quite understandable that in light of this questionable behavior by the defendant that the jury also rejected his and his alibi witness' unbelievable story that they coincidentally and serendipitously heard shots being fired as they were leaving Ishmael's hosue.

The defendant's argument that the People did not prove he intended to murder and did not know Cleaver and Perham were police officers is also belied by the record. The credible evidence before the jury shows that the defendant Bennnett was in a stolen car* which was implicated in "some robberies" (120).

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* It was stipulated that defendants had no permission or authority to be in or drive the vehicle (17).

When the police pulled behind the car they put a revolving red flashing light on the roof of the car and turned on the flashing red grill lights: all the telltale signs of a police vehicle. At that point, Bennett knew or "reasonably should have known" that the occupants of the car which followed them were police officers. P.L. § 125.27(1)(a)(i). Certainly, the jury came to this conclusion. That the defendant intended to murder the police officers was also a reasonable inference for the jury to draw from all the surrounding circumstances. The defendant fired a pistol – a deadly weapon – at them and actually hit the police car with a bullet. This fact is verified by the report of the ballistics expert Martin Shapiro (People's #8 in Evidence) who opined that the damage on the hood of the police car was a "bullet crease" (178).

In sum, it was rational for the jury in this case to credit the police identification testimony and to disbelieve Bennett and his alibi witness and to conclude thereby that the defendant's guilt had been proved beyond a reasonable doubt. See, People v. Jackson, 114 AD2d 858 (2d Dept. 1985).

POINT TWO

THE COURT DID NOT DEPRIVE THE DEFENDANT OF A FAIR TRIAL OR COMMIT REVERSIBLE ERROR IN NOT RECEIVING MAHAMED'S TESTIMONY (Answering Defendant's Point I, pp. 11-12).

The defendant contends that the court committed reversible error in not permitting Elias Mahamed to testify as either an alibi or ordinary defense witness. This contention is

untenable.*

Considering Mahamed as an Alibi Witness

At the outset, it should be noted that defense counsel did not argue that Mahamed was an alibi witness and thus, this issue was not preserved. CPL §470.05(2); People v. Brailsford, 106 AD2d 648 92d Dept. 1984).

Assuming, arguendo, that the issue was preserved, and that Mahamed was an alibi witness – or an extention of alibi witness – the court acted properly in not permitting him to testify. CPL §250.20(2) authorizes a trial court to exclude testimony of an alibi witness where a notice of alibi does not specify the witness. Here, the alibi notice only specified one witness i.e., Julian Ishmael.**

The defendant's allegation that the People knew Mahamed would be called to testify is erroneous. Not only does the defendant concede that there was no written notice of alibi served in conformity with the statute, but the prosecutor advised the court at the time Mahamed was called to testify that he received no advance notice that Mahamed would be called (314). Thus, the Court had the statutory authority to exclude

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* The co-defendant Chisholm was acquitted. The distinction between the two verdicts is understandable: Chisholm did not turn around and face the officers as did Bennett intially and during the chase. Also, Officer Cleaver stated that his view of Chisholm was blocked "to some extent" by Bennett's body which was directly behind Chisholm (144-145); and, although Chisholm drove the vehicle his fingerprints were not found on the steering wheel.

** Attached hereto and marked exhibit 1 is defendant's notice of alibi indicating that his sole alibi witness was Julian Ishmael.

Mahamed's testimony. CPL §250.20(3). The defendant's reliance on People v. Morales, 43 AD2d 917 (1st Dept. 1974) aff'd 37 NY2d 262 (1975); and People v. Peterson, 96 AD2d 871 (2d Dept. 1983) for the proposition that the court's exclusion of alibi witness testimony in the absence of statutory required notice of alibi warrants reversal is misplaced.

In Morales, a drug case, the defendant was prevented from calling an alibi witness as a sanction for failure to comply with the notice of alibi mandated of CPL §250.20 as then constituted. The conviction was reversed because as then constituted the notice of alibi statute did not provide for reciprocal discovery requiring the People to disclose the names of proposed witnesses to rebut the prospective alibi witnesses, thus rendering the statute unconstitutional by virtue of the holding in Wardius v. Oregon, 412 US 470 (1973). However, CPL §250.20 was rendered constitutional by amendment providing for reciprocal discovery. (L 1974 ch. 420). Therefore, unlike the Morales case, the court here applied the sanctions of a constitutional statute. The Peterson case is distinguishable from the instant case on the facts. There, in a robbery-burglary case, the defendant was denied the right to call an alibi witness although he had given the People eleven days written notice of alibi. Here, as indicated the defendant gave no notice. Additionally, the trial court in Peterson committed an egregious error, inter alia in allowing the prosecutor to state in summation that he defendant's witness had failed to corroborate the alibi defense. On appeal this Court concluded that that "comment was patently unfair in light of the preclusion imposed upon the defense." Here, the court provided the defendant with an eminently fair trial, and the prosecutor's conduct was proper throughout.

Considering Mahamed as an Ordinary Witness

An analysis of the record shows that as an ordinary witness, Mahamed's testimony was merely cumulative to Ishmael's and the defendant's testimony to a collateral issue: that the defendant was across the street from the site of the end of the chase about one half hour later, at about 1:00 a.m. The chase occurred between 12:19 a.m. and 12:24 a.m.* (318). Clearly, Mahamed's testimony was collateral to the main issue: the defendant's guilt. The defendant, as the record shows, knew Ishmawel lived in the area – (174-176) – and could easily have escaped from the scene and returned one half hour later with Ishmael.** In no way was Mahamed's testimony critical to the defense as his testimony did not exculpate the defendant.

Furthermore, it should be noted that on direct examination the defendant fully conveyed to the jury the story of his and Ishmael's meeting with Mahamed near the scene. In fact the defendant named and pointed out Mahamed seated in the courtroom, in the jury's presence (334-336).*** He also testified to the substance of their conversation. Thus, there was nothing Mahamed's testimony could have added to the defense. The defendant testified:

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* Defense Counsel Scheidler pointed out that the sprint report indicated that the helicopter arrived at the scene at about 1:45 a.m. (320). The defendant testified that he arrived at the scene about 30-40 minutes before (334). This would place the defendant at the scene at the earliest, approximately 36 minutes after the chase ended.

** It should be noted that the court received a statement from Alfred Seaman, an acquaintance of Bennett, presented to it by Bennett's attorney in support of the post-conviction motion to set aside the verdict, which asserted that he saw Bennet and Ishmael in the blue Chevrolet on the night of the incident. See Exhibit 2, pp. 5-6.

* According to the trial court Mahamed "stood up [in front of the jury] and acknowledged the defendant's identification of him." Exhibit 2, p. 13.

...that's when we met Mr. Mahamed... He's sitting over there. He was standing in front of his house... in a bathrobe... looking at the action.

* * *

We walked to him... [and] asked him what was going on... He said he didn't know.

So Mr. Mahamed was saying, 'Don't stand there. Someone could run out of there and they could start shooting.' And he said, 'Come in my gate.' So me an Julian [Ishmael] we went in Mr. Mahamed's gate and we were, you know, standing there, talking, laughing, you know.

* * *

So, we just... me and Mr. Ishmael, we just left, you know we told Mr. Mahamed, 'Nice talking to you,' blah, blah...,. and we just left... (334-336).

The defendant relies on People v. Cuevas, 67 AD2d 619 (1st Dept. 1979) for the proposition that he court committed reversible error in not permitting Mahamed to testify as an ordinary defense witness. The defendant's reliance on Cuevas is misplaced. There are a few important distinguishing features between Cuevas and the instant case. In Cuevas, an attempted robbery-assault case the defendant wished to call two witnesses to testify as to his whereabouts and activities after the time of the crime. Not only did the Cuevas court prohibit the defendant from calling the witnesses, it prohibited the defendant from mentioning their names. Here, not only did the defendant fully

relate to the jury his activities after the time of the crime and his meeting with Mahamed, he presented an alibi witness who also named Mahamed as the man they met across the street from the site of the end of the chase and, as indicated, Mahamed, was in the courtroom, identified by the name by the defendant and stood up in the jury's presence. Additionally, and importantly a distinguishing feature in Cuevas is that the identification testimony was weak. In Cuevas, the defendant was identified by a sole civilian complainant who "had difficulty seeing at close range." Cuevas, supra, at p. 227. The complainant in Cuevas was contradicted when he stated he never wore glasses. Here, on the other hand, the defendant was identified by two trained law enforcement officers whose ability to see well as not contested and whose eyewitness and independent lineup identifications were positive and unimpeached. Furthermore, in Cuevas, the court improperly curtailed the defendant's redirect examination and deprived him of a key opportunity to discredit the sole witness' identification. Here, there was no such vice. The trial court permitted defense counsel complete leeway to challenge Cleaver's and Perham's identification.

Considering all the aforesaid circumstances, the court did not abuse its discretion nor deprived the defendant of a fair trial in excluding Mahamed's testimony. In any event the defendant suffered no prejudice as a result. See, People v. Kancar, 307 NY 782, 783 (1954); cf. People v. Thomas, 116 AD2d 678 (2d Dept. 1986); People v. Henson, 113 AD2d 954, 955 (2d Dept. 1985); People v. Ceulet, 111 AD2d 833 (2d Dept. 1985).

Finally, in view of the overwhelming evidence presented by the eyewitness testimony of two trained police officers who positively, and unequivocally identified the defendant as the man who shot at them. (See, Point I) any error with regard to the

exclusion of Mahamed's testimony was harmless. There is no reasonable probability that any error in this regard, if indeed there was one, might have contributed to the defendant's conviction. People v. Crimmins, 36 NY2d 230 (1975).

POINT THREE

THE COURT PROPERLY DENIED DEFENDANT'S MOTION TO LET ASIDE THE VERDICT WITHOUT A HEARING. (Answering Defendant's Point III, pp. 17-18).

The defendant argues that the court committed reversible error in denying his motion to set aside the verdict on the grounds of newly discovered evidence without conducting a hearing. This argument is frivolous.

To be considered, "newly-discovered" evidence so as to support a motion to vacate a judgment of conviction, the evidence in question must meet all six criteria set aside in People v. Salemi, 309 NY 208, 216 (1955), specifically:

> 1. It must be such as will probably change the result if a new trial is granted; 2. It must have been discovered since the trial; 3. It must be such as could not have been discovered before the trial by the exercise of due diligence; 4. It must be material to the issue; 5. It must not be cumulative to the former issue; and 6. It must be merely impeaching or contradicting the former evidence.

Here, the evidence in question fails to meet the criteria in two respects, that is, (1) there is no probability that the

evidence would have altered the jury's verdict, and (2) the defendant did not establish by a preponderance of evidence that it could not have been discovered with due diligence before trial.

1. The evidence would not have altered the jury's verdict.

a) As to the "newly discovered" witness Alfred Seaman.

In support of his motion to set aside the verdict on the grounds of newly discovered evidence the defendant submitted to the court a letter from Alfred Seaman alleging that he saw the defendant and Ishmael get6 out of the blue Chevrolet "a few minutes" before the car chase leaving Ronald Cephus and Ricky Whitehouse seated within the vehicle when the police gave chase (S 3).* This statement contradicts both the defendant's and Ishmael's trial testimony that both he and Ishmael were in Ishmael's were in Ishmael's house a few hours before and during the time of the chase. In no way could this evidence "change the results." Furthermore, Seaman's oral statement, to the District Attorney's Office contradicted his written statement. In his oral statement, he alleged that Bennett and Ishmael exited the car about 8:30 p.m. on January 31, 1983 (S 4). This changed story, in which Seaman alleged a different time frame, also contradicted the defendant's and Ishmael's testimony that they were together in Ishmael's house at the time. Finally, Seaman submitted to a lie detecter test in which he performed "very poorly." His performance was characterized by the lie detector analyst as "highly deceptive" (S 5).

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* "S" numerical references are to the pages of he sentence transcript of September 25, 1984.

b. As to Rose Powell's testimony.

The prosecutor interviewed another "new discovered" witness for the defense, Rose Powell - the defendant's sister. She stated that she saw the defendant and Ishmael coming from a store at 10:30 p.m. on January 31, 1982 (sic) and during a conversation with him the defendant said "I'm going to Ishmael's house" (S 5). Not only does Powell's prospective testimony contradict knowledge of her brother's whereabouts after 10:30 p.m., it would not help exculpate him as the crime was committed almost two hours later.

2. The defendant did not establish that the newly discovered evidence could have been established with due diligence.

Another criterion to be met by the defendant in support of his motion to vacate his conviction on the grounds of newly discovered evidence is that he must show that it could not have been discovered before trial with due diligence. The defendant did not sustain that burden.* Notably, the trial court afforded the defendant the opportunity to testify at "an anticipated hearing" on September 25, 1984 as to any of his allegations made to the court in his letter of May 5, 1984, or as to any allegations made by Seaman in his statement of September 14, 1984. The defendant, after consultation with counsel said: "I prefer not to" (S 7).

In no way does the defendant demonstrate that even if he had acted diligently, he could not have discovered the aforesaid "newly discovered evidence" before trial. Nor does he

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* The court, in its decision on the motion stated that Bennett in his letter of May 5, 1984 to the court indicated that he knew about "Cephus-Whitehouse involvement prior to trial." Exhibit Z, p. 11.

demonstrate that such evidence would probably change the result if a new trial was granted.

Contrary to defendant's implication, the court did not have a problem with the fact that the jury acquitted the co-defendant who was also identified by the police. The court in its decision stated: "This court finds no problem with the jury's split determination. There was ample evidence in the trial record to support the verdict, including abundant evidence concerning the past and present incompatibility of the two defendant's" Exhibit 1, p. 3. Also, as indicated, the jury noted that Bennett, seated in the back seat, blocked the officers' view of the driver.

In sum, the People proved the defendant's guilt by overwhelming evidence and the jury's verdict would not be changed by the preferred testimony of the two alleged "newly discovered" witnesses, whose testimony was inconsistent with that of the defendant and his alibi witness, Ishmael. In addition the defendant has not shown that if he exercised due diligence he could not have discovered the witnesses during the almost 15 months from the time of the incident to the time of trial. Therefore, the proffered evidence. Nor does the record indicate that any hearing other than the Court's "anticipated hearing" or September 24, 1984, was necessary.*

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* See, Exhibit 2, p. 7.

POINT FOUR

THE COURT PROPERLY DECIDED THE SUPPRESSION MOTION (Answering Defendant's Point V, pp. 20-22).

The defendant argues that the court committed reversible error in not suppressing the lineup identifications by Officers Cleaver and Perham, which he claims were tainted by impermissibly suggestive photo identification procedures. This argument is devoid of merit. We shall in turn, review the hearing testimony, the Court's decision, and discuss that decision as it related to the identification testimony.

The Wade Hearing Evidence

A Wade hearing was commenced on December 18, 1983 before the Honorable Joan J. O'Dwyer and continued to December 20, 1983.

Detective **Daniel Collins** of the 105th Precinct, Detective Unit testified that he was assigned to investigate the attempted murder to police officers William Cleaver and Kevin Perham (H 9).*

Pursuant to that assignment, Collins obtained photos from the Police Department Photo Unit at One Police Plaza. On February 23, 1983, at about 3:00 p.m., he placed eight photographs including one of the defendant Tony Bennett, on a desk in the anti-crime office of the 105th Precinct. Collins then called Officer Perham and Cleaver into the office - separately -

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* "H" numerical references are to pages in the hearing transcript dated March 16, 1983.

to see if they could recognize among the photos, the man in the rear seat of a blue Chevrolet who shot at them during a car chase on February 1986 (H 14-15, 25-26, 30-32).

Perham, who viewed the photos first, picked out the defendant's photo within a minute. Perham said: "That's him, that's him, that's him..." Cleaver, who was called into the office next, identified Bennett's photo in less time than it took Perham (H 30, 34, 36, 38-39).

Later that evening, at 9:35 p.m., Collins arranged a lineup of six persons including Bennett. Cleaver and Perham - separately - picked out the defendant - number three - as the person who shot at them during the car chase. On viewing the lineup Perham immediately said: "He (number 3, Bennett) was in the back seat. He shot at us." Cleaver said: "[That's] the guy (number 3, Bennett) that shot at us" (H 14-16, 19, 42, 46).

Police Officer William Cleaver testified that while on duty in an unmarked police car, he observed a blue Chevrolet near a Shell station. After returning from a call to a different location he saw the Chevrolet going North on Rockaway Boulevard. When the vehicle sped away from the scene, Cleaver, who was driving the police vehicle, pursued it (H C 27, 37 -39).*

During the pursuit of the Chevrolet, the rear passenger, whom Cleaver identified as the defendant, leaned out of the car - turned around facing the police car - and fired two shots at the police. At this point, Bennett's face was visible in the light of both the police vehicle and overhead streetlights. Cleaver stated

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* "HC" numerical references are to the pages of the transcript of the continued Wade hearing of March 20, 1983.

that during the chase, his vehicle came as close as three feet from the Chevrolet. When the defendant fired the shots, he was ten feet away (HC 37-38, 41-42). He said, "I [saw] the man's face, sure (HC 42).

At the end of the chase, Cleaver saw the defendant when he exited the left rear passenger side of vehicle, pistol in hand, 25-30 feet away. The police car headlights and street lights illuminated the defendant's face during the chase (HC 45-46, 57).

Cleaver corroborated Detective Collins' testimony that he made a photo and lineup identification of Bennett at the 105th Precinct independent of Perham's identification in 20-25 seconds (HC 50, 52, 54-55).

Police Officer **Kevin Perham's** testimony paralleled Officer Cleaver's. He stated that the headlights of the police vehicle illuminated the rear seat of the Chevrolet when they first pulled behind it - and he saw Bennett. After about three minutes into the chase, the defendant fired his pistol at the police car. The defendant's arm and head were out of the Chevrolet when he fired his weapon twice. The car was "directly below the street light" at that time. At the end of the chase, when the defendant got out of the vehicle, 20-30 feet away, he turned, faced the officers, and pointed the pistol at them. At that time, in the reflection of the police car headlights, Perham was again able to see Bennett's face, "A few long seconds" (HC 61, 66, 68-70).

According to Perham, he made a photo identification of the defendant separate form that of Cleaver's. He selected the defendant's photo in "seconds" from a display of several photos laid out on a desk by Detective Collins at the 105th Precinct. He identified the defendant at the lineup as soon as he aw his

face (HC 73, 75-76, 78-79).

The Court's Decision

The court denied defendant's motion to suppress the lineup identification by Cleaver and Perham. After summarizing the evidence, it concluded that under the totality of circumstances the photo identification procedure was not unduly suggestive and, therefore, it did not taint the later lineup identification - "nor create the likelihood that [an] in-court identification would be tainted" (D 5).* As to the lineup, the court also found the procedure was not "suggestive or conducive to irreparable misidentification." Thus, the court held that testimony regarding the lineup was admissible at trial (D 5).

As to the photo identification procedure.

The photo identification procedure was not impermissibly suggestive as defendant contends.

The need for a fairly conducted pretrial identification procedure was articulated in United States v. Wade, 308 US 218 (1967). "The test to be used in determining the propriety of the pre-trial identification is one of fairness." People v. Logan, 25 N.Y.2d 184, 191 (1969).

The United States Court established a "totality of circumstances" standard to determine whether a pre-trial identification procedure violated due process." Stovall v. Denno, 388 U.S. 293, 302 (1967). To be avoided are those practices that may give rise to a "very substantial likelihood of

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* "D" numerical references are to the page of the court's decision attached hereto as Exhibit 3.

irreparable misidentification" as to amount to a denial of due process of law. Manson v. Brathwaite, 432 U.S. 98, 116 (1977).

Here, the photo identification procedure was fair. Detective Collins placed the defendant's photo along with seven others faced up on a table and held separate viewing with Officers Cleaver and Perham. The photo spread viewed by them "featured individuals similar in age and physical characteristics to the defendant." There was nothing "unduly suggestive in form or matter of exhibition" (D 5). Although the defendant's name was on the back of his photo, nothing in the record shows that either officer looked at the back of the photo before the identification procedures. When Detective Collins called the officers into the viewing room he merely asked one to the look at the photo (H 31, 35). He directed Officer Perham not to talk to Officer Cleaver after identifying the defendant's photo - he "made sure that they wouldn't speak to each other" (H 36). In sum, the photo identification procedures, under the totality of circumstances, were not impermissibly suggestive and thus did not taint the subsequent lineup or in-court identification.

As to the lineup identification procedures.

The lineup procedures were likewise not impermissibly suggestive or conducive to irreparable misidentification. "The stand-ins were of the same approximate age, skin coloration, and general physical characteristics as the defendant. There was nothing glaringly dissimilar in the appearance of the defendant to that of the stand-ins" (D-5). There is nothing in the record to show otherwise; the defendant's unsupported allegation to the contrary notwithstanding.

Detective Collins conducted separate lineup procedures with each officer; and merely asked them standard lineup procedure questions: Do you recognize anyone?; What number do you recognize?; Where do you recognize him from? (H 18). Thus, under all the circumstances the lineup procedure was not unduly suggestive, on the contrary it was conducted in an eminently fair and proper manner.

As to independent source.

Assuming arguendo, that the pre-trial identification procedure were suggestive, still, there was an independent basis for the in-court identification. This basis was established at the suppression hearing by clear and convincing evidence. See, People v. Williams, 73 A.D.2d 1019 (3d Dept. 1980).

Among the factors to consider in determining independent source include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, and the level of certainty demonstrated at the confrontation. See, Manson v. Brathwaite, 432 U.S.98 114, (1977).

The facts in this case is related to the above analysis show:

1. Opportunity to view. Cleaver testified that the observed the defendant's face during the chase when the defendant leaned out of the car, turned facing him and fired two shots. He stated that the police vehicle came as close as three feet to the Chevrolet and hat at the time the defendant fired the shots he was ten feet away from him (HC 42). Street lights directly overhead lit up the defendant's face - as did the police car headlights (HC 46). Officer Perham testified similarly to

Cleaver. He stated that the police car headlights were "on the rear of the car. I could see the rear seats."; that the defendant with "his arm and head outside the car" faced them and fired his pistol at them; and "When the defendant fired his pistol, he was "directly below the street lights" (HC 68). At the end of the chase, the defendant exited the vehicle "turned around and pointed the gun" at the officers. Perham asserted that he saw the defendant then "a few long seconds" (HC 70). Thus, both officers had an adequate opportunity to view the defendant - it takes only seconds to "indelibly sear" an image in one's memory. United States ex rel. Phipps, 428 F2d 912, 916 (2d Cir. 1970). See, People v. Herriot, 110 A.D.2d 851 (2d Dept. 1985) where this Court found that a few seconds viewing of the defendant, who wore a hooded sweatshirt and a baseball cap, sufficient to sustain conviction despite inconsistences in the complainant's testimony and the presentation of an alibi witness.

Additionally, Cleaver and Perham were not casual or passing observers as so often is the case with eyewitness identification: they were trained and experienced observers. See, People v. Morales, 37 N.Y.2d 271 (1975).

3. The Witnessess' level of certainty.

Both officer's unequivocally, unhesitatingly, and positively identified the defendant as the perpetrator in the rear seat of the Chevrolet who leaned out the door of the car, turned towards them and fired his pistol at them. At no time did they express any doubt that the defendant was the shooter. The record shows that at separate photo and lineup identification procedures Cleaver and Perham selected the defendant out of several individuals.

Contrary to defendant's allegations, there is nothing in

the record that supports his theory that the rear window of the Chevrolet was fogged; that there was insufficient light to make an identificaiton; or that knowledge of an arrest put pressure on them to identify someone. It has been held that informing a witness that he is going to view a suspect will not be itself vitrate on otherwise proper identification. People v. Osgood, 89 A.D.2d 76, 77-78 (2d Dept. 1982). Also, contrary to defendant's contention, the officers did not state that they could not make an identification. Perham stated categorically he never said that (HC 82); Detective Collins corroborated Perham's testimony when he testified that he spoke to Perham in person and Perham told him he could make an identification (H 72). Although Cleaver did not recall telling Detective Collins he was not sure he could make an identification, the fact remains that he was able to an did so - separately and independently of Perham's identification. It would be stretching credulity to the breaking point to believe that both officers mistakenly identified the defendant - considering the odds against them both picking the defendant's photograph out of eight and selecting him out of a lineup of six-independently and on separate occasions.

In sum, the photo identification procedure was not impermissibly suggestive and did not taint the lineup procedure which was proper.

Thus, the court acted properly in denying the defendant's motion to suppress the lineup identification. In any event, because there was independent source established at the Wade hearing, the in-court identification of the defendant at trial was proper even if the pre-trial identification procedures were impermissibly suggestive.

POINT FIVE

THE SENTENCE WAS PROPER. (Answering Defendant's Point IV, p. 22-23).

The defendant contends that because he was convicted of attempted murder in the first degree under PL § 125.25, a class B felony, he should have been sentenced to a prison term of 8 ½ to 25 years. This contention is erroneous - the defendant was convicted of attempted murder in the first degree under PL § 125.27, an A-1 felony. Clearly, under PL § 110.05, an attempt to commit a crime is a "class A-1 felony when the crime attempted is a class A-1 felony of murder in the first degree." (Emphasis added.) PL § 70.00(3)(a)(c) provides that for a class A-1 felony the minimum period of incarceration "shall not be less than 15 years." The maximum term for a class A felony is life imprisonment. PL § 70.00(2)(a). Thus, the court's sentence of from 15 years to life for the conviction of attempted murder of a police officer CPL § 110/125.27(1)(i) was the minimum period of incarceration permitted under the law and proper.

Moreover, although the defendant is correct that it is important to consider his potential for rehabilitation, it is also important to consider the protection the sentence can afford the community (deterrent factor). People v. Ferrar, 52 N.Y.2d 302, 305 (1981), and the effect the crime had on the victims - here, police officers engaged in performing their duties to protect the public.

In sum, the defendant's sentence was neither harsh nor illegal. It fell well within the maximum limits prescribed by law, i.e., 25 years to life PL § 70.00(2)(a), 3(a)(i). The defendant obtained leniency by his minimum sentence - he deserves no more; having fired a deadly weapon at police officers with the

intent to kill them. Therefore, in no way should the sentence be reduced.

CONCLUSION

THE JUDGEMENT OF CONVICTION
SHOULD BE AFFIRMED

Respectfully submitted,

JOHN J. SANTUCCI
District Attorney
Queens County

Seymour Roth
Assistant District Attorney
of Counsel

October, 1986

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS : PART C3

THE PEOPLE OF THE STATE OF NEW YORK

-against-

NOTICE
OF ALIBI

TONY BENNETT,

IND. NO. 842/83

Defendant.

PURSUANT to C.P.L. § 250.20, the defendant, by this court appointed attorney, CHARLES LAVINE, serves formal notice that the defense of alibi will be relied upon at the trial of the indictment.

At the time of the alleged crime the defendant was at 145-42 179th Street, Springfield Gardens, New York, JULIAN ISHMAEL, 172-16 144th Road, Springfield Gardens, New York 11434 is an alibi witness. There may be additional alibi witnesses, but appointed counsel is unable to ascertain their identities without the services of an appointed investigator. The appointment of such a necessary expert has twice been denied by the court, said relief having been opposed by the prosecution.

PLEASE TAKE NOTICE that not later than ten days before trial, the prosecution must serve and file a list of the

witnesses it proposes to offer in rebuttal to discredit the alibi along with their addresses and places of employment.

TO: JOHN SANTUCCI
District Attorney

JOHN J. DURANTE
Clerk of the Court

CHARLES LAVINE
Attorney for Defendant
70-49 Austin Street
Forest Hills, N.Y. 11375

Short Form Order

SUPREME COURT – STATE OF NEW YORK
CRIMINAL COURT - PART L-5 QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, NY 11101

PRESENT:
HON. WILLIAM D. FRIEDMANN
Acting Justice

THE PEOPLE OF THE STATE OF NEW YORK :

- against - : Ind. No. 843/83

: Motion to set aside verdict

TONY BENNETT :

Defendant :

The following papers numbered
1 to 4 submitted in this motion

AUGUSTUS C. AGATE, ESQ.
CHARLES D. LAVINE, ESQ.
For the Motion

JOHN SCARPA, A.D.A.
Opposed

Papers Numbered

Notice of Motion and Affidavits Annexed _____
Answering and Reply Affidavits _____

Exhibits _____

Minutes (Grand Jury) _____

Upon the foregoing papers and in the opinion of the court herein the defendant's motion is denied. (See attached memorandum decision dated 12/1/84.

GRANTED: JOHN J. DURANTE

Date: December 1, 1984 _____
WILLIAM D. FRIEDMANN, J.S.C.

MEMORANDUM

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART L-5

THE PEOPLE OF THE
STATE OF NEW YORK

BY WILLIAM B. FRIEDMAN

- against-

DATED: December 1, 1984

TONY BENNETT

Ind. No. 842/83

Defendant.

IN OPPOSITION TO THE MOTION

HON. JOHN J. SANTUCCI
District Attorney
By: John Scarpa, A.D.A.
125-01 Queens Boulevard
Kew Gardens, N.Y. 11414
(212) 520-5400

FOR THE MOTION

AUGUSTUS C. AGATE, ESQ
RESSLER AND AGATE
Post-Trial Attnys for Def.
123-33 83rd Avenue
Kew Gardens, N.Y. 11415
(212) 520-8722

CHARLES D. LAVINE, ESQ.
GROSSMAN, LAVINE & RINALDO
Trial Attorneys for Defendant
70-49 Austin Street
Forest Hills, N.Y. 11375
(212) 520-8722

OPINION OF THE COURT

(Confirming Decision, on the Record of September 25, 1984)

This trial, jury verdict and defendant Tony Bennett's motion to set aside the verdict against him include many dramatic developments. However, these events, though interesting, do not, at this time, justify granting any part of Bennett's motion.

RELEVANT EVENTS

The jury trial (March 20-27, 1984)* centered upon a wild shootout car chase through the streets of southeast Queens County, worthy of a movie or T.V. script. The chase involved two young black males in a blue Nova and two policeman following in a unmarked car. It took place on February 1, 1983, at or about 12:20 A.M. The blue car, the subject of the chase, had been stolen earlier that day form a nun in the Bronx. The car was first spotted in a parked position by the policemen at approximately 12:15 A.M. It was then occupied by four black males. Three to four minutes later, the policeman made a second pass by the car. As the unmarked police car was turning around, the blue car took off. During initial pursuit, two persons exited the blue car. The chase between the two vehicles and remaining occupants heated up. It covered high speeds, and a route including approximately nine turns. Shots were exchanged. Finally, the blue car was cornered behind J.H.S. 231. Both cars then stopped and the remaining occupants, in the blue car, exited into a wooded area behind the school. The two policemen were not injured. Defendant Bennett and his co-defendant Derrick Chisholm were not arrested until some 22

days after the occurrence.

THE BASIC QUESTIONS

The prime trial determination and the main point carried over into this post-trial inquiry was - - - was were the two occupants remaining in the blue car during the wild shootout street chase?

THE JURY'S SPLIT VERDICT

The jury's verdict placed defendant Bennett as the shooter, from the back seat of the blue car. It also acquitted co-defendant Derrick Chisholm of any involvement as the ****** (contrary to the testimony of the two policemen who had identified both defendants).

This court finds no problem with the jury's split determination. There was ample evidence in the trial record to support the verdict, including abundant evidence concerning the past and present incompatability of the two defendants. Their past antagonistic relationship was emphasized by a fight between them and their re-arrest, while they were passengers on the subway. This occurred shortly after, their case had been transferred from the calendar complex part in Kew Gardens, Queens, to the site of their trial in the Long Island City courthouse. Incidentally, their subway encounter caused a delay in the trial's commencement.

POST TRIAL MOTION

Following trial, but before sentence, Bennett's trial attorney filed a written motion to set aside the jury verdict pursuant to CPL 330.30. Subsequently adapted by Bennett's

current attorney, the motion relied upon People v. Cuevasn (67 A.D.2d 219, 225-226 [1st Dept, 1979]). It alleged trial error when this court refused to permit Bennett to call as a post event or extension of "alibi" witness, one Mr. Elias Muhammad (he saw Bennett and his alibi witness in front of his house one hour afer the chase ended). Muhammad's name had not been included in the alibi witness notice required under CPL 250.20. (Trial transcript of March 26, 1984 - Colloquy pp 32 - 42).

The second ground to set aside the verdict arose out of a post conviction letter (May 5, 1984), from Bennett to the court setting forth (a) differences with his trial attorney, and (b) the existence of relevant exculpatory evidence not revealed to the District Attorney or used at the trial (CPL 330.30[3]).

In essence, Bennett contended that prior to trial he gave the names of Ronald Cephus and Ricky Whitehurst to his trial attorney as the two persons that he had been told remained in the blue car at the time of the shootout car chase, that this information had not been transmitted to the Queens District Attorney's Office. Bennett's letter was circulated to all counsel for comment and followup. By letter (May 10, 1984), Bennett's former trial attorney indicated that the names of Cephus and Whitehurst had been brought to his attention by Bennett, for the first time, approximately ten minutes following the adverse jury verdict. That it was later confirmed to him by Bennett's sister and wife when he took them home after the verdict. Bennett's current attorney, by letter (May 15, 1984), urged that in the interests of justice that the contents of Bennett's post conviction letter (May 5, 1984), be considered as part of the then pending motion to set aside the verdict. The District Attorney's Office consented to this procedure.

FOLLOW- UP EVENTS

The District Attorney's office opposed the first branch of Bennett's motion which alleged that the court erred in failing to allow the post-event witness, Mr. Muhammad, to testify. It further, at the court's request, conducted an investigation to determine whether Ronald Cephus and Ricky Whitehurst, as related by Bennett, were involved with the blue car which was the subject of the shootout chase. The information, supplied by Bennett, was confirmed when fingerprints of both Cephus and Whtehurst were lifted from items recovered in the blue car. This established that Cephus and Whitehurst were in the car some time after it was stolen, in Bronx County, during the early part of the day on January 31, 1983. However, the question still remained unanswered as to who remained in the car during the chase and shooting sequence, comprising the period between 12:19 and 12:22 to 12:24 A.M. in the early morning hours of February 1, 1983.

Upon receipt of the information placing Cephus and Whitehurst in the blue car, this court set the matter down for an evidentiary hearing to inquire into the following: (a) the alleged differences between Bennett and his trial attorney regarding information and the involvement of Cephus and Whitehurst, (b) who were the four persons in the blue car when the police made their first pass? (c) who got out of the car during its early pursuit and who remained during the chase and shooting? and (d) what was the source of the information underlying (a) - (c)?

In the interests of justice and to enable both Bennett's current attorney and the District Attorney to conduct further investigations, to evaluate potential evidence, and secure witnesses, including Cephus and Whitehurst, various hearing adjournments were granted (both are reported to be

incarcerated).

During this period, a written statement from one Alfred Seaman was presented by Bennett's current attorney (September 14, 1984). In essence, it contended that Seaman saw Cephus, Whitehurst, Tony Bennett and Bennett's alibi witness, Julian Ishmael, who testified at trial, sitting in the blue car. Part of Seaman's statement stated: "A few moments later I saw Tony and Ishmael get out of the car and R.C. and Lil Rickey remained inside the car. A few moments later the police approached the car and R.C. sped off and police gave chase."

Based upon the Seaman statement and through arrangements between Bennett's current attorney and the Queens District Attorney's Office, Mr. Seaman was interviewed by the Queens District Attorney (September 24, 1984). Seaman indicated that he saw Bennett and Julian Ishmael leave the blue car sometime around 8:30 P.M. on January 31, 1983 (some three hours to three and one-half hours prior to the shootout chase). In furtherance of the District Attorney's investigation, Seaman was given a lie detector test. His test performance was reported as being "poor" and "highly deceptive."

The District Attorney further, in the presence of the defendant's current attorney, interviewed Bennett's sister, Rose Powell. She indicated that at some time on January 31, 1983, at approximately 10:15 P.M., while she was coming home from a neighborhood store, she saw her brother and Julian Ishmael, the alibi witness that did testify. She indicated that she spoke to her brother about his wife's efforts to locate him, and that her brother said to tell his wife he was going to Ishmael's house. She had no idea where her brother went after 10:30 P.M.

ABORTED HEARING

After noting the corporative and diligent investigatory followup which had accompanied the consideration of his motion, this court, at an anticipated hearing on September 25 1984, inquired as to whether Bennett wished "to give a statement under oath" with respect to the facts that he had set forth in his letter to the court from Rikers Island (May 5, 1984), or as to any of the facts that were brought forth in the Seaman statement (September 14, 1984). After consultation with is current attorney, Bennett said, "I prefer not to." The court then stated: "All right, you understand I am giving you the opportunity Mr. Bennett?" Bennett responded: "I understand." With a feeling of obvious frustration and dissatisfaction, this court then concluded the hearing, and denied Bennett's motion to set aside the verdict. It thereafter proceeded to sentence Bennett.**

GENERAL PRINCIPLES GOVERNING MOTIONS TO SET ASIDE A VERDICT

The grounds to set aside or modify a verdict, after a verdict's rendition, but, before sentence, are set forth in CPL 330.30. The proscribed procedure in making such motion is set forth in CPL 330.40. Such motion to set aside is addressed to the sound discretion of the trial court (People v Heuvel, 32 AD2d 993, 302 NYS2d 47 [3d Dept, 1969]; People v Palumbo, 282 AD 1059, 126 NYS2d 381 [2d Dept, 1953]). Its prime objective is to give the trial court, which is more familiar with the trial record, an opportunity to correct, modify or amplify a trial ruling or explain some of trial activity. Of equal importance is the perfection and supplementation of the trial record for eventual consideration by an appellant court.

It seems clear that a motion to set aside or modify a verdict becomes part of the appeal papers and that realistically, any denial will likely result in an appeal after judgment by the defendant, while the graning of any relief an appeal by the District Attorney (People v Daniels, 48 AD2d 905, 369 NYS2d 771 [2d Dept, 1975]; People v Mangano, 28 Hun 259, 1 NY Cv R 411).

Under such predictable circumstances, it would seen that any such motion should not be either perfunctorily made, or considered (People v Spiegel, 149 Misc 439, 267 NYS 512 [New York County, 1934] Rather, a trial court, presented with such a motion, has the responsibility of undertaking a careful review of the grounds raised and upon reasonable notice to and a fair opportunity to be heard by all concerned should see that substantial justice be done (People v Jones 115 NYS 800, affd 194 NY 83, 86 NE 810, 23 NY Cv R 178). When justified, an evidentiary hearing should be conducted by the court to inquire into any disputed or underdeveloped factual issues or other matters raised by the motion (People v Cadby, 75 AD2d 713, 427 NYS2d 121 [4th Dept, 1980]).

INEFFECTIVENESS OF COUNSEL IN NOT RELYING EXCULPATORY INFORMATION TO THE DISTRICT ATTORNEY

Bennett's contention that his trial attorney did not effectively defend him by not relaying exculpatory information about Cephus and Whitehurst being in the blue car, would seem to be a contention which can properly be raised by a motion to set aside a verdict pursuant to CPL 330.30(1). The catch-all first subdivision of CPL 330.30 authorizes the setting aside of a verdict during the period between verdict and sentencing upon any ground appearing in the record, which, if raised upon appeal

from the propsective judgment of conviction, would require a reversal of the judgment as a matter of law by an appellate court.

The factual difference between Bennett and his trial attorney, about when Bennett revealed the information about Cephus and Whitehurst (before trial or after verdict), justified the holding of an evidentiary hearing to inquire into thi disputed matter. Such a hearing was scheduled and adjourned. However, when Bennett eventually declined to proceed at the evidentiary hearing, or amplify upon his letter of May 5, 1984, this court found itself in the position where it could not develop the disputed issue any further. Accordingly, no further hearings were scheduled to inquire into the position of Bennett's trial attorney (letter of May 10, 1984), that the information about Cephus and Whitehurst had been made available to him for the first time by Bennett ten minutes after the adverse jury verdict (contra, People v Swanston, 13 Misc 2d 840, 181, NYS 395 [Bronx County, 1958]).

NEWLY DISCOVERED EVIDENCE
(CPL 330.30[3])

The discretionary power to grant a motion to set aside a verdict after rendition but before sentence, and to order a new trial on the ground of newly discovered evidence is now statutorily defined (CPL 330.30[3]; People v. Hazelton, 58 AD2d 945, 397 N.Y.S.2d 199). This subdivision, which codifies the requirements of "newly discovered evidence: set forth earlier by the Court of Appeals, in People v Salemi (309 NY 308, 215, 128 NE2d 377 [1955]) is quoted in total:

> "3. That new evidence has been discovered since the trial which could not have been produced by

> the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant."

It seems quite clear that a court's discretionary power should be exercised in granting a motion on the grounds of newly discovered evidence, and also in the interests of justice, only when the requirements of the statute have been satisfied. This satis-faction must be established by the defendant, proving the grounds of "newly discovered evidence" by a preponderance of the evidence (CPL 330.40[2][8]; People v Kehler, 28 NYS2d 71 [Kings County, 1941]).

These grounds, as related to Bennett's motion will be dealt with separately below.

In summary, to qualify as "newly discovered evidence," the offered evidence must meet the trhee criteria of CPL 330.30(3).

(1) It must have been discovered since the trial;

(2) It must have been such as could not have been discovered before trial by the exercise of due diligence; and

(3) It must be such as would probably (not possibly) have made the verdict more favorable to defendant (change the result).

(People v Salemi, supra; Bellacosa, Practice Commentary 330.30, McKinneys Criminal Practice Law, vol 11A, pp. 47-48).

In this court's opinion, the evidence concerning Cephus and Whitehurst, and/or the information concerning Bennett and the alibi witness, Ishmael, being in the car prior to the shoutout chase (contrary to their trial testimony), does nto satisfy any of the three criteria necessary to qualification as "newly discovered evidence."

As to criteria (1) and (2) - Bennett's letter of May 5, 1984 indicates that he knew about the Cephus-Whitehurst involvment prior to trial. A defendant who withholds evidence during trial is not entitled to a new trial by subsequently relying on the evidence withheld (People v Missina, 73 AD2d 899, 424 NYS2d 219 [1st Dept, 1980]), nor can it be argued under such circumstances that it constitutes newly revealed evidence available for the first time (People v Stokes, 83 AD2d 968, 443 NYS2d 12 [3d Dept, 1981]).

As to criteria (3) - the level of the Cephus-Whitehurst involvment - their being in the blue car some time after it was stolen on the day in question - does not create a probability that such evidence, if it had been received at the trial, would have resulted in a more favorable verdict regarding Bennett (People v Lane, 88 AD2d 655 [2d Dept, 1982]). The prime question remained, after Cephus-Whitehurst, as to who was in the blue car at the time of the shootout chase. In the court's opinion, the jury, based upon the testimony of the two policemen involved, had ample evidence to conclude that Bennett was the shooter in the back seat, regardless of the fact that no fingerprints of Bennett's were found in the car as were Cephus' and Whitehurst's.

FAILURE TO ALLOW EXTENTION OF ALIBI WITNESS TO TESTIFY

In urging error by this court, Bennett relies upon the 1979 decision of the Appellate Division, First Department, in People v Cuevas (67 AD2d 219 [225-226). This court was familiar with and had reviewed Cuevas prior to making its trial ruling. It was this court that brought Cuevas to Bennett's trial attorney's attention in a post conviction conversation.

In both Ceuvas as in this case, there was a failure by defense counsel to include the name of a prospective extension of alibi witness in the pretrial notice required to be served pursuant to CPL 250.20.

Bennett here contends that reconsideration of Cuevas should lead this court to hold that the witness Muhammad, who lived across from the site where the chase ended, was improperly excluded, and that accordingly, the verdict should be set aside. While both this case and Cuevas involved an "extension of alibi" witness who was allegedly in the defendant's presence a short time after the time of the crime, there are distinguishable fact patterns and overriding factors which differentiate the two cases.

In Cuevas, there was an improper restriction in the redirect examination of a witness. This restriction was a great prejudice to defendant there. No such error is alleged to have been made in the instant case.

Secondly, in Cuevas, the defendant was not even allowed to mention the name of his potential alibi witness, whereas in the instant case, Bennett was allowed to testify in depth about the excluded witness, Mr. Mohammad, who lived

across the street from the end of the car chase site. Furthermore, Mohammad was actually present in the courtroom during trial, within full view of the jury, and he even stood and acknowledged the defendant's identification of him.

Thus, based upon CPL 330.30(1) and a review of the relevant portions of the trial record, this court must conclude that it is not required to set aside a verdict unless, as a matter of law, an error was made requiring reversal upon appeal. In Cuevas, a combination of trial errors were present. No such ground or justification has been presented here.

CONCLUDING OBSERVATIONS

Based upon the trial testimony and post-trial motion record, it is this court's opinion that bennett knew more about the shootout chase than he or his alibi witness, Julian Ishmael, were willing to testify to at the trial. That it was only after the adverse verdict that Bennett felt the necessity to implicate Cephus and Whitehurst. In all probability, Whitehurst-Cephus-Bennett and Ishmael were in the car - but who was in the car during the shootout chase? As a note of caution, a post-trial motion to set aside a verdict can have perilous fallout effects over and above generating an initial decision by the trial court. Arguments advanced and matters brought forth can, in a very real way, undermine or bolster a trial record and can become the subject matter of appellate concern.

Matters raised on this motion have affected the credibility of witnesses who testified, thus contradicting their positions taken at trial. For example, Bennett and his alibi witness, Julian Ishmael, testified at trial that their only knowledge of or connection with the car chase incident was that they observed police action one hour after the chase concluded

from in front of Mr. Muhammad's home. (The alleged importance of the extension of alibi witness contention, supra.) Bennett's revelation about his pretrial knowledge of Cephus and Whitehurst being in the car was at odds with his trial testimony, which indicated no knowledge or involvment concerning the later car incident or its involvment in a police chase. Further, the Seaman statement involved both Bennett and his alibi witness, Ishmael, with the blue car, thus contradicting both the testimony of Bennett and Ishmael about any involvment with the blue car. Finally, the contention of Bennett's sister, Rose Powell, that she saw her brother and talked to him at about 10:30 P.M. on the evening of the incident, was not constant with the testimony of either Bennett or Ishmael, which placed both at Ishmael's home at that time and Included no street encounter that evening with anyone, including Rose Powell.

Accordingly, and for all the reasons stated above, Bennett's motion is denied in all respects.

Short form order signed herewith.

The clerk of the court is directed to mail a copy of this decision and order to the attorney for the defendant and to the District Attorney.

Long Island City
New York
December 1, 1984

William D. Friedmann
J.S.C.

FOOTNOTES

*

Defendant Bennett and codefendant Derrick Chisholm were charged with:

Attempted Murder in the First Degree (2 counts);
Attempted Murder in the Second Degree (2 counts);
Criminal Possession of a Weapon in the Second Degree;
Reckless Endangerment in the First Degree (2 counts);
Criminal Possession of Stolen Property in the First Degree; and
Unauthorized Use of a Motor Vehicle in the Third Degree.

**

Attempted Murder in the First Degree (2 counts) - 15 years to life;
Criminal Possession of a Weapon in the Second Degree - 5 years to 15;
Criminal Possession of Stolen Property in the First Degree - 2 1/3 to 7;
Unauthorized Use of a Vehicle in the First Degree - 1 year.

***

On or about November 5, 1984, after sentence but before the written formal decision, Bennett again wrote directly to the court. Again, comment was requested from all the attorneys involved, both past and present. Both Bennett's post-trial attorney and the District Attorney termed his letter as containing nothing "new." This court's review confirms that nothing new has been presented and therefore it will not give the letter any further attention, but will make it, and the response thereto, part of the court's record for possible appellate consideration.

SUPREME COURT : STATE OF NEW YORK
QUEENS COUNTY : CRIMINAL TERM :PART J-6

PRESENT :

Hon. WILLIAM D. FRIEDMANN,
Justice

THE PEOPLE OF THE STATE OF NEW YORK,

Indictment No. 842/83
MOTION to Vacate

-against-

TONY BENNETT,

Submitted _____
Argued _____
Hearing _____

Defendant.

The following papers numbered
1 to ___ submitted in this motion

PETER J. AVENIA, ESQ.
FOR THE MOTION

RICHARD A. BROWN, D.A.,
Queens County

BY: SEYMOUR ROTH, ESQ.
A.D.A.
OPPOSED

Papers Numbered

Notice of Motion and Affidavits annexed ____ _____
Answering and Reply Affidavits _____ _____
Exhibits _____ _____
Minutes _____ _____
Other _____ _____

Upon the foregoing papers, the motion is denied to the extent of the annexed memorandum decision.

GRANTED
DATE: August 2, 1991

_____
WILLIAM D. FRIEDMANN,
J.S.C.

SUPREME COURT,
QUEENS COUNTY
CRIMINAL TERM, PART J-6
- - - - - - - - - - - - - - - - - - - -X
THE PEOPLE OF THE
STATE OF NEW YORK

BY: WILLIAM D. FRIEDMANN, J.

-against- DATED: AUGUST 2, 1991

TONY BENNETT, INDICTMENT NO. 842/83

Defendant.
- - - - - - - - - - - - - - - - - - - -X

APPEARANCES

FOR THE MOTION:

PETER J. AVENIA, ESQ.
ATTORNEY for Defendant
65 South Street #8
Northampton, Massaschusetts 01060

IN OPPOSITION:

RICHARD A. BROWN
District Attorney, Queens County
BY: SEYMOUR ROTH, ESQ., A.D.A.
For the People
125-01 Queens Boulevard
Kew Gardens, New York 11415

SUPREME COURT,
QUEENS COUNTY
CRIMINAL TERM, PART J-6
- -X
THE PEOPLE OF THE STATE
OF NEW YORK

BY: WILLIAM D. FRIEDMANN, J.

-against- DATED: AUGUST 2, 1991

TONY BENNETT, INDICTMENT NO. 842/83

Defendant.
- -X

Defendant moves this court, pursuant to CPL Section 440.10, to vacate his judgment of conviction, inter alia, of Attempted Murder in the First Degree, upon grounds of newly discovered evidence and ineffective assistance of counsel. For reasons set forth below, the motion is denied in its entirety.

I.

HISTORY OF THE CASE

This is the latest (but most certainly not the final) chapter in the saga of Tony Bennett, see, (People v. Bennett, Ind. No. 842/83, 1211/84 (unpublished decision); the prior decision denying defendant's motion to dismiss pursuant to CPL 330.30, People v. Bennett, 128 AD2d 540, 512 N.Y.S.2d 472 (1987) Lv. denied. (The conviction was affirmed by Appellate Division).

A. THE FIRST TRIAL - On February 1, 1983, a car chase "worthy of a movie or T.V. script" took place through the streets of Queens, New York. (Citation omitted)

During the chase, the occupants of the car fired several shots at pursuing police officers. Finally, its occupants exiting with the car still in motion, fled into the surrounding area and avoided police capture (but only temporarily). The police officers had clearly seen the occupant of the back seat of the car and identified him as being the defendant, Tony Bennett.

At trial the defendant took the witness stand in his own defense and categorically denied ever being in the vehicle from which the shots were fired at the police. The defendant presented an elaborate explanation to account for his whereabouts during the time in question stating he was with a friend, drinking, napping and watching television.

The police officers testified that they were certain Tony Bennett was in the vehicle and that he had fired the shots at them.

The jury, in an obvious show of disbelief in the defendant's testimony found the defendant guilty of Attempted Murder in the First Degree (Two Counts); Criminal Possession of a Weapon in the Second Degree; Reckless Endangerment in the First Degree (Two Counts), Criminal Possession of Stolen Property in the First Degree, and Unauthorized Use of a Vehicle in the Third Degree.

B. POST TRIAL MOTION - Following trial, but before sentence, Bennett's trial attorney filed a written notice to set aside the jury verdict pursuant to CPL 330.30. Subsequently adopted by Bennett's second attorney, the motion relied upon

People v. Cuevas (67 AD2d 219, 225-226 [1st Dept. 1979]). It alleged the trial court committed reversible error when this court refused to permit Bennett to call as a post event or extension of "alibi" witness, one Mr. Elias Muhammad (he allegedly saw Bennett and his alibi witness in front of his house one hour after the chase ended). Muhammad's name had not been included in the alibi witness notice required under CPL 250.20. (Trial transcript of March 26, 1984 - Colloquy pp. 32-42).

The second ground to set aside the verdict arose out of a post conviction letter (May 5, 1984), from Bennett to the court, setting forth (a) differences with his trial attorney, and (b) the existence of relevant exculpatory evidence not revealed to the District Attorney or used at the trial, (CPL 330.30(3)).

In essence, Bennett contended that prior to trial he gave the names of Ronald Cephus and Ricky Whitehurst to his trial attorney as the two persons that he had been told remained in the blue car at the time of the shootout car chase, that this information had not been transmitted to the Queens District Attorney's Office. Bennett's letter was circulated to all counsel for comment and followup. By letter (May 10, 1984), Bennett's former trial attorney indicated that the names of Cephus and Whitehurst had been brought to his attention by Bennett, for the first time, approximately ten minutes following the adverse jury verdict* That it was later confirmed to him by Bennett's sister and wife when he took them home after the verdict. Bennett's second attorney, by letter (May 15, 1984), urged that in the interests of justice that the contents of Bennett's post conviction

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* Inasmuch as Bennett is a self-admitted perjurer, (see letter infro pg 7), this court finds the attorney's account to be credible and gives much weight to his account of events.

letter (May 5, 1984), be considered as part of the then pending motion to set aside the verdict. The District Attorney's Office consented to this procedure.

C. FOLLOW UP EVENTS - The District Attorney's office opposed the first branch of Bennett's motion which alleged that the court erred in failing to allow the post even witness, Mr. Muhammad, to testify. It further, at the court's request, conducted an investigation to determine whether Ronald Cephus and Ricky Whitehurst, as related by Bennett, were involved with the blue car which was the subject of the shootout chase. Credibility of the information, supplied by Bennett, was somewhat bolstered when fingerprints of both Cephus and Whitehurst were lifted from items recovered in the blue car. This established that probably Cephus and Whitehurst were in the car some time after it was stolen, in Bronx County, during the early part of the day of January 31, 1983.

However, the question still remained unanswered as to who remained in the car during the chase and shooting sequence, comprising the period between 12:19 and 12:22 to 12:24 A.M. in the early morning hours of February 1, 1983.

Upon receipt of the information placing Cephus and Whitehurst in the blue car, this court set the matter down for an evidentiary hearing to inquire into the following: (a) the alleged difference between Bennett and his trial attorney regarding information about the involvement of Cephus and Whitehurst, (b) who were the four persons in the blue car when the police made their first pass? (c) who got out of the car during its early pursuit and who remained during the chase and shooting? and (d) what was the source of the information underlying (a) - (c)?

In the interests of justice and to enable both Bennett's

second attorney and the District Attorney to conduct further investigations, to evaluate potential evidence, and secure witnesses, including Cephus and Whitehurst, various hearing adjournments were granted (at the time both Bennett and Cephus were reported to be incarcerated).

During the period, a written statement from one Alfred Seaman was presented by Bennett's second attorney (September 14, 1984). In essence, it contended that Seaman saw Cephus, Whitehurst, Tony Bennett and Bennett's alibi witness, Julian Ishmael, who testified at the trial, sitting in the blue car. Part of Seaman's statement stated: "A few moments later I saw Tony and Ishmael get out of the car and R.C. and Lil Rickey remained inside the car. A few moments later the police approached the car and R.C. sped off and police gave chase."

Based upon the Seaman statement and through arrangements between Bennett's second attorney and the Queens District Attorney's office, Mr. Seaman was interviewed orally by the Queens District Attorney (September 24, 1984).. Seaman indicated that he saw Bennett and Julian Ishmael leave the blue car some time around 8:30 P.M.on January 31, 1983 (some three hours to three and one-half hours prior to the shootout chase). In furtherance of the District Attorney's investigation, Seaman was given a lie detector test. His test performance was reported as being "poor" and "highly deceptive."

The District Attorney further, in the presence of the defendant's second attorney, interviewed Bennett's sister, Rose Powell. She indicated that at some time on January 31, 1983, at approximately 10:15 P.M., while she was coming from a neighborhood store, she saw her brother and Julian Ishmael, the alibi witness that did testify. She indicated that she spoke to her

brother about his wife's efforts to locate him, and that her brother said to tell his wife he was going to Ishmael's house. She had no idea where her brother went after 10:30 P.M.

D. ABORTED HEARING - After noting the cooperative and diligent investigatory followup which had accompanied the consideration of this motion, this court, at an anticipated hearing on September 25, 1984, inquired as to whether Bennett wished "to give a statement under oath" with respect to the facts that he had set forth in his letter to the court from Rikers Island (May 5, 1984), or as to any of the facts that were brought forth in the Seaman statement (September 14, 1984). After consultation with his second attorney, Bennett said, "I prefer not to." The court then stated: "All right, you understand I am giving you that opportunity Mr. Bennett?" Bennett responded: "I understand." With a feeling of obvious frustration and dissatisfaction, this court then concluded the hearing, and denied Bennett's motion to set aside the verdict. (Citations ommitted)

It should be noted that this court's frustration and dissatisfaction was generated not by belief in Bennett's innocence but by the recognition that Mr. Bennett might have perjured himself before his court and thus may have contributed to obstructing this court's role in seeking a truthful account of the events of March 28, 1984. This belief (that the defendant had perjured himself) was confirmed when this court came into receipt of a notarized letter from Tony Bennett and Ronald Cephus dated April 12, 1985, which reads as follows:

"This is concerning the incident that happened on the night of January 31, 1983. it involved four people before the alleged crime that one of the four was eventually charged with it one month after the commission. we were sitting in the auto

on rockaway blvd. julian ishmael, ricky whitehurst, tony bennett, ronald cephus. the car was spotted by a unmarked patrol car. after about 5 minutes we decided to leave the area before doing so one person left the vehicle. tony b. bennett and proceeded to walk away. it was (three) of us left in the car when we started to drive down Rockaway blvd. the vehicle that the police were riding in was coming on the other side of the street and after noticing us made a u-turn and came behind the vehicle. after stopping on the corner of Rockaway and 134th ave. another person left the vehicle julian ishmael. we than left the area and went on our way, the police vehicle didnot stop us to question our activities. there was no-shots fired by anybody in the auto. the firing was done by the police who had no probable caused to act in this manner. i am aware of my fingerprints being in the auto this was discovered after i was mentioned as one of the remaining occupants in the auto. I was asked by the person who was charged to relay this story to the lawyer assigned to handle the motion he is seeking to present when the stories of the ones involved reach the lawyer. We both agreed Upon this, and signed our names on the bottom." (See Appendix 1)

This notarized letter is directly at odds with Mr. Bennett's trial testimony that he was at Julian Ishmael's house and that he was never present in the automobile from which the shots were fired and as such is an indication that Mr. Bennett has perjured himself at least once. Interestingly, if there is yet a true third story which has yet to be told, Mr. Bennett may have perjured himself twice.

F. THE APPEAL - On appeal, People v. Bennett, 128 AD2d 540 (1987), the defendant contended, inter alia, that htis court committed reversible error by not allowing the defendant to call a witness who would have testified he saw the defendant approximately one hour after the time in question. Id.

The Appellate Division, Second Department, while agreeing with the defendant's contentions stated, "inlight of the overwhelming evidence of guilt, this testimony concerning the defendant's presence near the scene of the crime approximately one hour after its commision was harmless beyond a reasonable doubt". Id (emphasis supplied).

The court went on to hold, "[w]e have examined the defendant's remaining contentions and find them to be without merit". Id at 541.

II.

DEFENDANT'S PRESENT MOTION

On May 28, 1991, defendant's current attorney moves this court pursuant to C.L. 440.10 for an order vacating the judgment heretofore entered against the defendant upon the grounds of newly discovered evidence, prosecution's erroneous statement during summation, and ineffective assistance of counsel. The court deals with these arguments sereatim.

A. NEWLY DISCOVERED EVIDENCE

The "newly discovered" evidence comes to this court in form of defendant's present willingness to tell the "truth" about the events of January 31, 1983. This new "truth" is directly opposed to old "truth" which the defendant testified to at his first trial. This new "truth" is bolstered by an affidavit from Julian Ishmael in which Mr. Ishmael states he was with Tony Bennett the day of January 31, 1991 inside the automobile from which the shots were fired and that Tony Bennett couldn't have fired the shots because Bennett was the first to exit the automobile (before the chase began). It should be noted that

Mr. Ismael also "bolstered" Mr. Bennett's testimony at trial when Ismael denied he and Bennett were ever inside the automobile. This court supposes Mr. Ismael will state the facts in whatever form he feels is most advantageous for Mr. Bennett and as such, this court gives his affidavit little if any weight.

Assuming arguendo this court did give the statements of Bennett and his accomplice great credence, defendant argues that this qualifies as "newly discovered" evidence and as such this court should vacate the judgment against the defendant. The test for "newly discovered" evidence was enunciated by the Court of Appeals in People v. Salami, 309 NY 208, 215-216 (1955), cert. denied, 350 U.S. 950 (1956).

"Newly-discovered evidence in order to be sufficient must fulfill all the following criteria: 1. It must be such as will probably change the result if a new trial is granted; 2. It must have been discovered before the trial by the exercise of due diligence; 4. It must be material to the issue; 5. It must not be cumulative to the former issue; and 6. It must not be merely impeaching or contradicting the former evidence." Id. (emphasis supplied).

Defendant contends that this "newly discovered" evidence meets all but the second criteria, i.e. - it must have been discovered since the trial. Defendant further contends that the failure to meet the second criteria is only technical and as such this court should overlook this technicality in the interest of justice. This court does not agree with the defendant's assessment. The criteria laid down in Salami are sini que non, the failure to satisfy just one criteria would be fatal, here, the defendant fails to meet at least four of the criteria. He fails to meet criteria one in that if a new trial were granted the result could probable not change. The reasoning for this is that the

jury obviously placed great weight on the police identification of Bennett as the shooter, this despite Mr. Bennett's and Mr. Ismael's denial of their ever being in the car. Surely the jury would not think them innocent when with the new testimony they place themselves inside the vehicle (which would put them closer to the scene of the crime). Also no rational juror would find either Bennett's or Ismael's new testimony credible in light of their prior perjury.

Defendant fails to meet criteria two or three in that the evidence was always available to the defendant, in fact the defendant was given ample opportunity to present this evidence and instead chose to perjury himself. If this court were to rule any other way on this point the result, from a public policy point of view, would certainly be disastrous. Firstly, defendants would be encouraged to withhold information from counsel and to perjure themselves before the court. Secondly, the courts would be clogged with defendants who intentionally have given information incrementally and who then motion the court for a new trial on each "new revelation" they deem to share with the court.

This court finds that the defendant "having knowingly and willingly participated in an attempt to obstruct justice through perjured testimony, [he] is not now in a position to ask this court to undo the consequences of his own conscious wrongdoing", People v. Avery, 129 AD2d 853, 857 (1987), see (People v. Nelli, 29 AD2d 725, 726 (1968)).

Finally, the defendant fails to meet criteria 6 in that it is required that the new evidence must not be merely impeaching or contradicting the former evidence. Clearly this new testimony is just contradicting the police officer's testimony that Bennett remained inside the vehicle and in fact this testimony

also contradicts defendant's former testimony. The court now moves to defendant's second argument.

B. PROSECUTION'S ERRONEOUS STATEMENT DURING SUMMATION

Defendant contends that at trial the prosecutor made two highly improper and prejudicial comments. The first comment was that defense counsel had admitted Tony Bennett's involvement in the crime was the second comment suggested to the jury that it had no choice but to find that the defendant intended to kill the two officers. Assuming arguendo, we agreed with defendant's contentions, "the judgment of conviction may not now be vacated by coram nobis, since such error could have been reviewed on the appeal which defendant had taken from the judgment". People v. Cantaldo, 15 AD2d 566, 222 NYS2d 741, (1965) affirmed 11 NY2d 982, 229 NYS2d 423, 186 N.E.2d 125.

This brings the court to defendant's final argument.

C. INEFFECTIVE ASSISTANCE OF COUNSEL - Defendant's present counsel contends that defendant's previous counsel individually and collectively provided ineffective assistance of counsel. Defendant's current counsel cites two critical junctures as which defendant was denied effective assistance of counsel. The first occurred at trial when counsel failed to object when the prosecutor made improper comments during summation. The second occurred when counsel advised Bennett not to testify at the hearing of September 25, 1984. Defendant contends that this ineffective counsel equals the denial of counsel in violation of rights guaranteed by both the United States and New York Constitutions. U.S. Const. 6th Amend.; N.Y. Const., Art. I Section 6.

Once again this court cannot agree with defendants contentions. Firstly, as stated above, defendant's objections to prosecutor's statements should have been brought up on appeal. Secondly, if defendant had exposed his perjury at the hearing of September 25, 1984, this court would have looked on it as unfavorably then as it does now so former counsel was proper to advise defendant to remain silent. However, assuming arguendo, that present counsel is correct in that what he describes is ineffective assistance of counsel this court would still not provide relief. "[A]bsent an indication that counsel, even if assigned by the court, was unfit to defend the accused or that the representation was such as to make the trial a farce and a mockery of justice, a judgment of conviction may not be vacated on a claim that counsel was incompetent." People v. Lester, 10 AD2d 971, 202 NYS2d 385 (1960). See also, People v. Brown, 7 NY2d 359, (1960) People v. Lee, 4 AD2d 770, (1959) affd 4 NY2d 843. So even if counsel was ineffective, this court finds the trial was not reduced to the level of farce or mockery of justice.

III. CONCLUSION

In conclusion this court has found all of defendant's contentions to be without merit and as such, this court sees no reason to disturb the jury's finding of guilt and this court's subsequent sentences.

Therefore, the motion to vacate the judgment is denied in its entirety.

Order granted accordingly.

The clerk of the court is directed to mail a copy of this memorandum and order to the attorney for the defendant and to

the District Attorney.

WILLIAM D. FRIEDMANN, J.S.C.

April 12, 1985

Dear MR. LANDAU,

This is concerning the incident that happened on the night of January 31, 1983m. it involved four people before the alleged crime that one of the four was eventually charged with it one month after the commission. we were sitting in the auto on rockaway blvd. julian ishmael, ricky whitehurst, tony bennett, ronald cephus. the car was spotted by a unmarked patrol car. after about 5 minutes we decided to leave the area before doing so one person left the vehicle. tony b. bennett and proceeded to walk away. it was (three) of us left in the car when we started to drive down Rockaway blvd. the vehicle that the police were riding in was coming on the other side of the street and after noticing us made a u-turn and came behind the vehicle. after stopping on the corner of Rockaway and 134th ave. another person left the vehicle julian ishmael. we than left the area and went on our way, the police vehicle didnot stop us to question our activities. there was no-shots fired by anybody in the auto. the firing was done by the police who had no probable cause to act in this manner. i am aware of my fingerprints being in the auto this was discovered after i was mentioned as one of the remaining occupants in the auto. I was asked by the person who was charged to relay this story to the lawyer assigned to handle the motion he is seeking to present when the stories of the ones involved reach the lawyer. We both agreed upon this, and signed our names on the bottom.

Very TURLYY YOURS
Tony B. Bennett

Very Turly Yours,
Ronald Cephus

Sworn to before me this 16th day
of April, 1985

_____
Notary Public
Carol M. Griffith

STATE OF NEW YORK :
SUPREME COURT
COUNTY OF QUEENS :
Criminal Term

The People of the State
of New York,
Respondent,

-against-

NOTICE OF MOTION

Ind. #842/83

TONY BENNETT,
Defendant.

SIR(s):

PLEASE TAKE NOTICE that upon the duly verified petition of Tony Bennett, the petitioner herein and upon all prior pleadings and proceedings heretofore had herein, the petitioner respectfully shows to this court and seeks the following relief;

DATE AND TIME OF MOTION: June 26, 1995, at 9:30 a.m. or as soon thereafter as the petitioner can be heard.

PLACE OF MOTION: 125-01 Queens Blvd.
Supreme Court County of Queens
Kew Gardens, N.Y. 11415

OBJECT OF MOTION:

Pursuant to Article 400.10 § 440.10, 1(b)(c)(f)(h), § 440.30 (5)(6)(7), Title 28 USC §2254 Article 440 of the C.P.L. and the petitioner evokes his Statutory Right to be present at such hearing.

To: Supreme Court Clerk
125-01 Queens Blvd.
Kew Gardens, N.Y. and
District Attorney of
Queens County.

Yours, etc:

_____

TONY BENNETT
88-A-6051 Pro Se
Drawer B
Stormville, NY 12581-
0010

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF NEW YORK)
ss.:
COUNTY OF DUTCHESS)

I Tony Bennett, being duly sworn deposes and says;

That I am the petitioner herein and that I was the defendant in the case of The People of the State of New York against Tony Bennett-Indictment number 842/83.

That the parties and the indictment remain the same except that the codefendant Derrick Chisholm was found not guilty and the charges therein was dismissed based upon that verdict.

That this motion is brought pursuant to State and Federal requirements based upon Article 440.10,1(b)(c)(f)(h), 440.30 (5)(6)(7) of the Criminal Procedure Law and Title 28 USC § 2254 of the United States Codes Annotated.

That a Federal question of Law and Fact requires that the defendant in a Criminal Case first bring the issue's on a Article 440 to exhaust those issue's that have been brought on Direct Appeal and found to be without merit, the recent changes in the law as it relates to the harmless error doctrine which would pertain to Article 440.10, 2(a) with the relevant change in the law as it relates to prior decisions by the courts in the State of New York.

That the court and the prosecutor violated the petitioners Federal Constitutional Rights under the VI and XIV §I of the United States Constitution by denying the petitioner his

right as a Criminal defendant to have a witness testify at his trial and the prosecutor knew that the testimony would have been unfavorable to the people and would have proved that the petitioner was not guilty of the criminal charges against him and that said charges where in fact manufactured by police against the petitioner and an unlikely co-defendant.

Under the 6th and 14th Amendment of the United States Constitution a defendant in a criminal case has a Right to a (fair) trial by a jury and the Right to present witnesses in his defense and the Right to confront and cross examine adverse witnesses against him.

The petitioners Right both Statutory and Constitutional was violated by a last minute tactic by the prosecutor at the end of trial by excluding a very important defense witness on the pretext that the prosecutor was not properly served with a Notice of Alibi as to the witness Mr. Mahammed. Through out trial the prosecutor conceded to two alibi witnesses, let Mr. Mahammed be sworn as a witness in the face of the jury, and then the court placed Mr. Mahammed under " Court - Order " to be back in court on Monday [ie;see page 35 of trial transcript March 22, 1984] and the witness Mr. Mahammed was present during the whole trial subject to court order, and when counsel was precluded from calling the witness, the court offered the prosecution still a chance to call mr. Mahammed, the prosecutor refused. Under § 250.20 and § 300.10 of the C.P.L, on March 21, 1984 [*T.T.page 6,21,24,26,27,-and March 22,1984 T.T. pages 31,32,34,35] the prosecutor knew before the witnesses were to testify that they were going to be called, unless the prosecutor can show a prejudice to the people's case, then the court is required to weigh the prejudice to the defendant, this was not done.

The court merely cured this oversight of counsel or the prosecutor by excluding the Alibi witness. Counsel as informed as the prosecutor was and any oversight would have been on the prosecutors office and not defense counsel, as counsel stated on the record that the prosecutors office was notified. Even assuming, that the witness Mr. Mahammed was an alibi witness, against the petitioners contention that Mr. Mahammed was merely a witness of the alibi witness due to the courts interested witness charge, Mr. Mahammed's testimony would only tend to substantiate the alibi witnesses testimony as to the whereabouts of the petitioner at the time that the crime was to have been committed as alleged by police.

New York State Constitution, under Article I§6 of the New York State Constitution, a criminal defendant is entitled to Due Process of the law. The petitioner did not receive Due Process of the law.

Amendment's VI, XIV of the United States Constitution, the petitioner has a Statutory and Constitutional Right to present witnesses in his defense, and the Right to Due Process, this was violated by the actions of the prosecutor and the court.

Harmless Error: Harmless Error Doctrine as defined in Black's Law Dictionary (6th Edition) as; An error which is trivial or formal or merely academic and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final out come of the verdict of the trial, it is further regarded under Federal Criminal Procedure Rule 7(c), § 52, New York State Criminal Procedure Law § 250.20 which relates directly to Alibi witnesses. For the prosecutor throughout the trial, to say nothing and then after the witness was sworn in and questioned by the court, in the face of the jury

and then to have that witness excused and never testify at the trial, could only show why the petitioner was found guilty and the codefendant who presented no witnesses on his behalf, be found not guilty, surely showed that the jury was prejudiced by this act.

The court made Mr. Mahammed an extension of the Alibi witness and applied C.P.L, § 250.20 and not considering § 300.10 which placed the petitioner beyond a disadvantage when Julian Ishmael was the alibi witness, Mr. Mahammed was a witness as to how the petitioner got from Ishmael's house to the area of the crime, to exclude Mr. Mahammed as a witness places both the petitioner and Ishmael in the area with nothing further, thus, under the theory of People v. Cuevas,- 67 A.D.2d 219, and Smith vs. United States, 360 U.S.1,6, People v. Lilley, 141 A.D.2d 849, People v. Dillard, 96 A.D.2d 112, and People v. Josan, 92 A.D.2d 902, the petitioner was precluded based upon the failure of the prosecutor to be notified or the prosecutor misrepresented the facts to the court, either one occurred which taken by the jury and with no explanation of the completed facts, and without the witness Mr. Mahammed to complete the testimony was a sure conviction for the prosecution, Thus, if counsel was negligent in his duties to the petitioner, then the issue would more properly have been to hold counsel in violation under People v. Barret, 145 A.D.2d 842, and the court should have looked closer at the identical case of **People v. Loprimo**, 69 A.D.2d 890.

The court in People v. Bennett, 128 A.D.2d 540, conceded to the fact that Loprimo (Supra) was in use at the time but, that the Loprimo case did not apply to the petitioners case due to the overwhelming evidence. The overwhelming evidence was the same for the codefendant that was found not guilty at the same trial, the same testimony, the same evidence, the same

judge, the same jury. What was not the same that the witness was sworn in and asked questions by the court in front of the jury and told to come back under court order, Loprimo did not have the benefit of actually having the witness take the oath in front of the jury and then disappear from testifying and the court failing to give curative instructions to the jury all assured the prosecution atleast one conviction, that of Tony Bennett.

On page 312 of the trial transcript the following took place in the presence of the jury;

The Court: Next witness, please ?

Mr. Levine: Elias Mahamed.

ELIAS MAHAMED, resident of Queens County,was called as a witness on behalf of the defendant, Tony Bennett, after being duly sworn by the court clerk, testifies as follows:

Mr. Scarpa: Judge, at this time, I'd like to have an application heard at sidebar.

Mr. Scarpa: Judge, at this time, I'm compelled to ask counselor for an offer of proof. I have been served with a Notice of Alibi with only one alibi witness. I ask that this is –

Mr. Levine: He is not an alibi witness.

The prosecutor had ample time and could have made any application prior to the witness being sworn in front of the jury and failed to do so, after further colloquy the court ruled on page 314 that the defense could not use the witness. On page 322 the court ruled that the witness was an alibi witness and that the defense could not used Mr. Mahamed, and without any

curative instructions to the jury asked for another witness. The prosecutor should have been charged under People v. Bonaparte, 98 A.D.2d 778, for misconduct, as this was a violation of the petitioners 6th and 14th Constitutional Amended Right to present witnesses in his defense and with the prosecutor never mentioning the lack of notice prior to trial and leading the court to believe that nothing was wrong, the prosecutor had agreed on many occasions that he knew about a Alibi and a Rebuttal witness, and it was mentioned many times at trial about two defense witnesses and not one witness, **Witnesses** with a plural is more than one. The prosecutor was never misled by defense counsel, nor was defense counsel trying any dirty tactic's, surely, the defendant was placed at a disadvantage and this led to the defendants conviction of guilt based upon the action's of the Court and the prosecutor or in the alternative the lack of action by defense counsel. Whatever, the defendant should not have been charged with the loss of a witness. On page 363 the court said I gave you a ruling that I though was an appropriate one. I could very well have been wrong. This representation by the court was correct, the court was wrong, the prosecutor was wrong, and so was the Appellate Division wrong, this defendant has suffered for the past twelve years for this mistake and this motion must be granted based upon the facts and information herein, this would also give credence to Prosecutorial Misconduct (ie; see, People v. Woodhull, 105 A.D.2d - 815; People v. Mott, 94 A.D.2d 415).

The petitioner was denied his Right to be present at all material stages of the trial and the Right to be present at the Sandoval hearing and the Right to take part therein. On March 20, 1984, The court reporter noted that the defendant was not present and that the case was adjourned until March 21,1984, at that time the court reporter noted at page 4;

Appearances same as previously noted:

- - - -

No where in the record does it mention that the defendant Tony Bennett was present, and the only Sandoval issue that was discussed was the mention of a Y.O. and the decision was reserved by the court until trial, the decision was never made as to the petitioner Tony Bennett, nor was this issue ever brought up to the court nor to the Appellate Division. The petitioners Rights under People v. Sandoval-34 N.Y. 2d 371, was violated and the right under People v. Dokes, -79 N.Y.2d 656, People v. Favor, 82 N.Y.2d 254, People v. Kirkland,-188 A.D.2d 1083; People v. Dean, 188 A.D.2d 1082; In Dean Supra and Kirkland Supra, it is clear from the record and the court reporters transcription of the record that the petitioner was not present and could not take a meaningful participation in the alleged Sandoval hearing prior to trial, nor could the petitioner object to the courts decision to reserve same. The petitioners right to be present and to take part in the proceedings therein was clearly violated. This is just another denial of a Right by all concerned and it shows the disparity towards the petitioner by trial court and the prosecution.

With the issue's raised herein this petitioner seeks a hearing pursuant to § 440.30 (5)(6)(7) of the C.P.L, and Title 28 USC § 2254 as a federal Requirement for exhaustion of remedies there-of and that this court grant the relief herein requested to vacate the sentence and conviction which is by virtue of indictment 842/83 Attempted Murder 1°.

That the District Attorney shall be required to serve the petitioner at least 20 days prior to any scheduled hearing on this petition and that the petitioner reserves the right to file a reply

to the prosecutors answer herein. That the prosecutor be directed by this court to file Documentary Evidence in support of any Affirmation filed herein and if the facts are conceded that this court direct and file an order of Ad Testificandum In Personam with the Department of Correction and the Sheriff of Queens County Directing and the petitioner be brought before this court for the purpose herein.

VERIFICATION OF PETITION

STATE OF NEW YORK)
ss.:
COUNTY OF DUTCHESS)

That I Tony Bennett, being duly sworn says;

That I am the petitioner herein and that the facts as alleged herein are based upon personal knowledge from the records and that information is true and correct as stated herein.

Sworn to before me the 5th
day of June, 1995.

TONY BENNETT
Pro-Se
Drawer B
Stormville, N.Y.
12582-0010

Notary Public
EDWARD J. UHNAK

(EXHIBITS OMITTED)

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF QUEENS:
CRIMINAL TERM, PART L-4

THE PEOPLE OF THE STATE OF NEW YORK,	:	Return Date: June 30, 1995
Respondent,	:	AFFIRMATION IN OPPOSITION
-against-	:	TO DEFENDANT'S
TONY BENNETT,	:	MOTION TO VACATE
	:	JUDGMENT
Defendant.	:	Queens County Indictment No.
	:	842/83

STEPHEN ANTIGNANI, an attorney admitted to practice in the State of New York, affirms the following statements to be true under the penalties of perjury:

1. I am an Assistant District Attorney, of counsel to Richard A. Brown, the District Attorney of Queens County. I am submitting this affirmation in opposition to defendant's June 5, 1995 pro se application to vacate his conviction pursuant to C.P.L. § 440.10. I make the statements in this affirmation upon information and belief, based upon my review of the records and files of the Queens County District Attorney's Office.

2. On February 1, 1983, defendant was riding in the rear

seat of a stolen blue Chevrolet down Rockaway Boulevard. A police car followed the Chevrolet for a short distance, and then activated its red "fireball" light and its grill lights to signal the car to stop. The Chevrolet did not stop, and Police Officers William Cleaver and Kevin Perham began to chase the Chevrolet in their police car. During this chase, the Chevrolet made nine turns in an effort to "shake" the police, and defendant fired two shots at the police car, striking the car both times.

3. For these acts, defendant and the driver of the stolen Chevrolet were charged with two counts of Attempted Murder in the First Degree (Penal Law §§ 110.00/125.27[1]), two counts of Attempted Murder in the Second Degree (Penal Law §§ 110.00/125.25[1]), Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03), Criminal Use of a Firearm in the First Degree (Penal Law § 265.09[1]), Reckless Endangerment in the First Degree (Penal Law § 120.25), Criminal Possession of Stolen Property in the First Degree (Former Penal Law § 165.50), and Unauthorized Use of a Motor Vehicle in the Third Degree (Penal Law § 165.05).

4. On March 21, 1984, the trial court conducted defendant's Sandoval hearing, which, according to court records, defendant and counsel both attended.[1]

5. Defendant and his co-defendant, Derrick Chisholm, proceeded to trial and, on March 28, 1984, a Queens County jury convicted defendant of two counts of Attempted Murder in the First Degree, Criminal Possession of a Weapon in the Second Degree, two counts of Reckless Endangerment in the First Degree, Criminal Possession of Stolen Property in the First Degree, and Unauthorized Use of a Motor Vehicle in the Third

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[1] A copy of the "Court Sheet" is attached as People's Exhibit A.

Degree.[2] Chisholm was acquitted of all charges.

6. On or about April 24, 1984, defendant filed a motion to set aside the jury verdict pursuant to C.P.L. § 330.30, claiming that: (1) the trial court committed reversible error in refusing to allow defendant to call Elias Mahamed as a defense witness; (2) defendant and his trial attorney had differences with each other; and (3) there existed relevant exculpatory evidence not previously revealed to the prosecutor or utilized at trial. On February 1, 1985, defendant withdrew that application.

7. On September 25, 1984, defendant was sentenced to concurrent indeterminate prison terms of from fifteen years to life on the attempted murder counts. The court also imposed lesser terms on the remaining counts to run concurrently with the fifteen years to life sentences for attempted murder. Defendant is currently incarcerated pursuant to this judgment.

8. On or about March 28, 1986, defendant's assigned appellate counsel filed a brief on defendant's behalf in the Appellate Division, Second Department, raising the following issues: (1) that the court erroneously refused to allow a defense witness, Elias Mahamed, to testify despite the fact that defendant had failed to serve timely notice of alibi for Mahamed; (2) that the People failed to prove defendant's guilt beyond a reasonable doubt; (3) that the trial court improperly denied defendant's motion to set aside the verdict on the grounds of newly discovered evidence under C.P.L. § 330.30 without

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[2] The Criminal Use of a Firearm count had been dismissed by the People prior to the jury's deliberations.

conducting a hearing;[3] (4) that the two convictions of attempted murder in the first degree should be reversed because the People failed to prove beyond a reasonable doubt defendant's intent to cause death and his knowledge that the victims were police officers; (5) that the trial court erred in not suppressing the police officers' lineup identifications; and (6) that defendant's sentence was excessive.

9. On March 2, 1987, the Appellate Division, Second Department, unanimously affirmed defendant's conviction, finding that the court's error in precluding Mahamed's testimony was harmless beyond a reasonable doubt, that defendant's guilt had been proven beyond a reasonable doubt, and that defendant's remaining claims were meritless. People v. Bennett, 128 A.D.2d 540 (2d Dept. 1987). Defendant's appellate attorney subsequently sought leave to appeal to the Court of Appeals. On May 7, 1987, leave to appeal was denied. People v. Bennett, 69 N.Y.2d 1001 (1987) (Bellacosa, J.).

10. On May 7, 1991, defendant, through privately retained counsel, filed a motion to set aside his conviction pursuant to C.P.L. § 440.10, arguing: (1) that newly-discovered evidence justified a new trial; and (2) that trial counsel was ineffective. On August 2, 1991, this Court denied defendant's motion.

11. Defendant now moves, pro se, to vacate his conviction on the grounds that: (1) the court's refusal to allow Elias Mahamed to testify at trial was not harmless error; (2) the prosecutor's objection to Mahamed's testimony amounted to prosecutorial misconduct; and (3) defendant was denied his right

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[3] In fact, as explained above, the trial court never considered defendant's motion under C.P.L. § 330.30 because defendant withdrew it.

to be present at his Sandoval hearing.

12. As explained more fully in the attached memorandum of law, all of defendant's claims are procedurally barred. His first two claims are barred under C.P.L. § 440.10(2)(a), as having been previously determined on the merits upon an appeal from the judgment. Defendant's third claim is not only procedurally barred because it could have been raised either on direct appeal or in his prior 440 motion and is conclusively refuted by the record, it is also patently devoid of merit.

WHEREFORE, and for the reasons set forth in the accompanying memorandum of law, defendant's motion to vacate his judgment of conviction should be summarily denied.

Dated: Kew Gardens, New York
June 27, 1995

Stephen Antignani
Assistant District Attorney
(718) 286-5852

To: Tony Bennett
#84A6051
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582-0010

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM, PART L-5

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THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

MEMORANDUM OF LAW :

-against- :

TONY BENNETT, :

Defendant. :

----------x

POINT ONE

DEFENDANT IS PROCEDURALLY BARRED FROM RAISING HIS FIRST TWO CLAIMS.

This Court cannot entertain defendant's claim that his conviction should be vacated because of the court's failure to allow Elias Mahamed to testify, since defendant has already raised this claim on his direct appeal. Nor can defendant successfully challenge that ruling by claiming that it was prompted by prosecutorial misconduct. The Appellate Division has already determined that the trial court's refusal to allow Mahamed to testify at defendant's trial, in light of the overwhelming evidence of defendant's guilt, amounted to

harmless error. People v. Bennett, 128 AD2d at 541.[4] Defendant cannot re-litigate this claim on a motion under C.P.L. § 440.10. Nor can he raise his collateral claim that the prosecutor urged the Court to make this ruling in bad faith.

Section 440.10(2)(a) of the Criminal Procedure Law mandates the denial of a defendant's motion when "the ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue." Defendant has already adjudicated the precise issue that he raises here in his first claim, and does not even contend in his moving papers that there has been a retroactive change in the controlling law. Furthermore, defendant's second claim cannot possibly succeed in view of the Appellate Division's ruling on that issue because, even if the prosecutor did act in bad faith in asking for preclusion -- a fact that defendant has failed to establish -- that fact would only justify vacatur of defendant's conviction if it actually prejudiced defendant. Since the Appellate Division already concluded that the preclusion was harmless beyond a reasonable doubt, any claim in this motion that is based upon the preclusion of Mahamed's testimony must be summarily denied. See C.P.L. § 440.10(2)(a)

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[4] A copy of the Appellate Division's decision is attached as People's Exhibit B.

POINT TWO

DEFENDANT IS PROCEDURALLY BARRED FROM RAISING HIS THIRD CLAIM AND, IN ANY EVENT, THAT CLAIM IS DEVOID OF MERIT.

Defendant's third contention, that he is entitled to have his conviction vacated because he was allegedly not present at his Sandoval hearing, is also procedurally barred. Pursuant to C.P.L. § 440.30(4)(c), this Court should deny defendant's motion to vacate judgment without a hearing because the allegation is conclusively refuted by documentary proof. The court papers reveal that on March 21, 1984, the date of the Sandoval hearing, defendant was present with his counsel, Charles Lavine. See Exhibit A. That evidence conclusively refutes defendant's claim that he was not present during this hearing. This claim is thus procedurally barred under C.P.L. § 440.30(4)(c).

Even if the evidence that defendant and his attorney were present at defendant's Sandoval hearing were not conclusive, a motion to vacate judgment is not a substitute for an appeal, and must be denied, if, although there are sufficient facts on the record to permit the appellate court to review the claims raised in the motion, the defendant unjustifiably failed to raise the issues on his direct appeal. C.P.L. § 440.10(2)(c); People v. Cooks, 67 N.Y.2d 100 (1986). On direct appeal, defendant raised six issues but failed to raise the on-the-record claim that he is now raising in his motion to vacate judgment. Therefore, because defendant could have raised this claim on direct appeal, but unjustifiably failed to do so, his claim is procedurally barred from review by this Court.

And, even if the record was not sufficient to permit review on direct appeal, defendant could have caused such facts to appear on the record. Therefore, if such is the case here, then defendant's claim is barred under C.P.L. § 440.10(3)(a). Finally, even if this is a purely off-the-record claim, it is still procedurally barred because defendant could have raised this issue in his original 440 motion, but unjustifiably failed to do so. See C.P.L. § 440.10(3)(c).[5]

In any event, even assuming arguendo that defendant was not present, his claim that his right to be present at his Sandoval hearing was violated pursuant to People v. Dokes, 79 N.Y.2d 656 (1992), is meritless. In People v. Favor, the Court of Appeals held that Dokes applied retroactively to those cases within the appellate process, and distinguishes between cases pending on direct appeal and convictions that have already become final. 82 N.Y.2d 254, 261 n.2, 267 (1993). Specifically, the Court held that, " for purposes of retroactivity analysis, our court has drawn a sharp distinction between cases on direct appeal and cases in which '[t]he normal appellate process [has come] to an end'. " Id. (citing People v. Pepper, 53 N.Y.2d 213, cert. denied, 454 U.S. 967 [1981]).

In this case, defendant's conviction was final on March 2, 1987, because it had been upheld by the Appellate Division. See People v. Pepper, 53 N.Y.2d at 222. Both Dokes and Favor were decided after March, 1987, and cannot, therefore, be applied to defendant's motion. As a result, defendant is precluded from invoking any purported Dokes rights in this

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[5] Moreover, defendant's claim that he was not present at the Sandoval hearing is an assertion of fact unsupported by any other affidavit or evidence, and there is no reasonable possibility that it is true. Thus, the claim is also barred under C.P.L. § 440.30(4)(d).

collateral attack on his conviction. See People v. Favor, 82 N.Y.2d 254, supra; People v. Pepper, 53 N.Y.2d at 222.

Moreover, a defendant's absence from a Sandoval hearing does not warrant reversal if the outcome of the hearing was favorable to the defendant, thereby rendering his presence "wholly superfluous." People v. Smith, 82 N.Y.2d 254 (1993) (companion case to People v. Favor, 82 N.Y.2d 254, supra); People v. Dokes, 79 N.Y.2d at 662. Here, defendant's only prior conviction had been converted to a youthful offender adjudication, to which the Court precluded any reference. This ruling obviously did not have any chilling effect on defendant's decision to testify. In fact, defendant did choose to testify at trial. Moreover, the cross-examination of defendant contained no references to defendant's prior bad acts or crimes. The court's ruling was, therefore, favorable to defendant, and defendant's presence would not have been meaningful, as he would not have needed to provide any pertinent information about the details of his prior crime.

In short, defendant's claim that he was not present during the Sandoval hearing is meritless, belied by the record, and procedurally barred.

CONCLUSION

For the reasons set forth above, defendant's motion to vacate his judgment of conviction should be summarily denied.

Respectfully submitted,

RICHARD A. BROWN
District Attorney
Queens County

CHERYL HONE
STEPHEN ANTIGNANI
Assistant District Attorneys
of Counsel

June 27, 1995

STANDARDS & GOALS Sep 22, 1983 DEADLINES FOR THIS CASE ARE: TRIAL SENTENCING DEFENDANT PRESENT WITH COUNSEL (Augustus Agate) (Arr. Only) ARRAIGNED NOT GUILTY PLEA ENTERED ADJOURNED TO 5/10/83 FOR PRE TRIAL FELONY SCHEDULE BAIL CONDITIONS P/C	3/21/84 3/21/84 5-1-84 2/1/85	Sandoval Hearing held see Steno record Deft pres w/counsel C. Lavine ADA John Scarpa Rep Jack Gershon WILLIAM D. FRIEDMANN LS Deft. remanded for trial all parties as above WILLIAM D. FRIEDMANN, LS DEFT. PRES W/COUNSEL CHAR. LEVINE WHO IS RELIEVED. AUGUSTUS C. AGATE RETAINED. MOTION TO SET ASIDE VERDICT MADE ADJ. TO 6/5/84 REMAND. HON. W.D. FRIEDMANN REP H. RELLA ADA J. SCARPA Deft. appeared on

COURT REPORTER Sam Cioreiori JUDGE HON. RALPH SHERMAN APRIL 13 1983 18 B Atty Assigned DEC 16 1983 Deft pre w/atty Charles Levine ADA James Quinn CR E Kalish Wade held testimony taken cont'd 12-20-83 P/C HON. JOAN O'DWYER DEC 1983 Def pres w/atty Charles Levine ADA James Quinn CR E Kalish cont'd T/T BSRDR C-3-1-8-84 P/C HON. JOAN O'DWYER		motion to set aside sentence with attny Martin Landou. Ast DA John Scarpa. Court Reporter: Robert Horwitz. Motion w/d by defense attny. Granted by the court, Off calendar. Hon. WILLIAM D. FRIEDMANN L-5

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

____AD2d _____ Submitted - January 22, 1987

WILLIAM C. THOMPSON, J.P.
JAMES F. NIEHOFF
MOSES M. WEINSTEIN
GERALDINE T. EIBER, JJ.

2754 E

The People, etc., respondent
v. Tony Bennett, appellant.
(Ind. No. 842/83)

DECISION & ORDER

Donald E. Gilbert, New York, N.Y., for appellant.

John J. Santucci, District Attorney, Kew Gardens, N.Y. (Seymour Roth of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Friedmann, J.), rendered September 25, 1984, convicting him of attempted murder in the first degree (two counts), criminal possession of a weapon in the second degree, reckless endangerment in the first degree (two counts), criminal possession of stolen property in the first degree and unauthorized use of a motor vehicle, upon a jury verdict,

and imposing sentence.

ORDERED that the judgment is affirmed.

Upon the exercise of our factual review power we are satisfied that the evidence was of sufficient quantity and quality to establish the defendant's guilt beyond a reasonable doubt. The two police-officer victims separately identified the defendant in a lineup and such identifications by police officers, who are trained to carefully view and identity suspects, are entitled to great weight (see, People v. Morales, 37 NY2d 262).

Further, while the court erred in precluding the defendant from calling a defense witness, Mr. Mahamed, who would have testified that he had spoken with the defendant and his alibi witness approximately one hour after the commission of the crime, this error does not require a reversal. The defendnat had testified that he was at his friend's house at the time the crime was committed and had joined the crowd that appeared near the scene of the crime when shots were heard. His friend corroborated this account. The defendant further testified that he had spoken to Mr. Mahamed, his neighbor, near the scene and had inquired as to what was happening. As Mahamed's testimony would not have accounted for the defendant's whereabouts during the crime or placed him away from the crime scene shortly thereafter (see, People v. Cuevas, 67 AD2d 219), he was not an alibi witness (CPL 250.20). Thus, the defendant was not required to include his name in his notice of alibi and he should have been permitted to call him as a witness. However, in light of the overwhelming evidence of guilt, this testimony concerning the defendant's presence near the scene of the crime approximately one hour after its commission was harmless beyond a reasonable doubt (see, People v. Crimmins, 36 NY2d 230).

We have examined the defendant's remaining contentions and find them to be without merit.

THOMPSON, J.P., NIEHOFF, WEINSTEIN and EIBER, JJ., concur

ENTER:

Martin H. Brownstein
Clerk

March 2, 1987

AFFIDAVIT OF SERVICE
BY MAIL

State of New York)
)ss:
County of Queens)

SABRINA MARS, being duly sworn, deposes and states as follows:

1. I am over the age of 18 years and not a party to this action.

2. On June 29, 1995, I served the within **AFFIRMATION, MEMO OF LAW, & EXHIBITS** in the case of People v. **TONY BENNETT**, on the following defendant pro se:

Tony Bennett
84-A-6051
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582-0010

by causing one true and correct copy of the document to be placed in a post-paid wrapper and then deposited in the official depository maintained and controlled by the United States Postal Service located at 80-02 Kew Gardens Road, Kew Gardens, New York 11415.

SABRINA MARS

Sworn to before me this
29th day of June, 1995

Notary Public

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: Criminal Term Part L-5

The People of the State of New York, : PETITIONER'S REPLY

:

Respondent,

:

-against-

:

Tony Bennett,

:

Petitioner.

I Tony Bennett, am the petitioner herein and I am filing this Reply to the District Attorney's frivolous and criminal Affirmation in opposition to the defendant's Motion to Vacate Judgment.

1. That the district attorney is seeking relief from this court that would be a violation of the New York State Criminal Procedure Law and the United States Codes under Title 28 USC § 2254(b) and Title 2241-2254 of the United States Codes.

2. The District Attorney cites hypothesis and arguendo's on paper that the County and or State Agencies could use to off set the State budget crisis with. The District Attorney has wasted a lot of time and money for schooling that could have been better used other than arguing a matter that he most assuredly knows nothing about or how to argue the matter before the court. Under Jennison v. Goldsmith, 940 F.2d 1308; Washington v. James, 996 F.2d 1442; Though, the petition has

unexhausted and exhausted claims in it, the Supreme Court has to review both claims and render a decision on the merit of the record and not some frivolous record that is not a court transcript, the district attorney would have this court believe that exhibit A is some genuine court document that is no more a legal representation than a Wendy's hamburger, meat is meat and this alleged document with no indication of who wrote it, where it came from, half of the form is written and no authentication as to who wrote it, nothing more than notes that do not present facts that are signed by anyone. The court transcript refutes the belied representation by the responding district attorney and refutes any exhibit that the district attorney could produce, or forge as an exhibit. Therefore, the representation by the prosecutor of this alleged exhibit.

In point two of the Memorandum of law is now giving rise to an Effective Assistance of trial and appellate counsel coupled with the Sandoval issue and admitted by the prosecutor by claiming § 440.30(4)(c) of the CPL and the representation that the district attorney is trying to refute is only adding more issue's and merit to the petitioners claims. Also in point two of the same self styled Memorandum of law (Which is not required under Article 440.30) says that the Dokes case "assuming - arguendo" that the Dokes case was not retroactive, the district attorney would now assume the roll as legislature also in dictating to the court how the law must be applied, the district attorney is not an elected official, legislature or otherwise.

This court must stay within the perimeters of the State and Federal Statues and Constitution and based upon the trial transcript this court must grant the petitioner a hearing In Personam unless the district attorney can produce a transcript to refute the proof therein.

WHEREFORE the petitioner prays that this honorable court grant the relief herein under the New York State Criminal Procedure Law and for whatever relief this court deems just and equitable.

FURTHER, that the district attorney's opposition is without merit and Exhibit A and it's representation if fraudulent and worthless to this court to represent any facts thereof, Exhibit B proves ineffective assistance of both trial counsel and appellate counsel, Moreover, the district attorney has stated that the petitioners claims are barred by the Statue, the Criminal Procedure Law when it was reappealed in 1974 it was not the legislatures intent to limit collateral attack of a conviction, therefore, again the district attorney would like to play legislature, and in determining or applying the retroactivity or how it should be applied to cases. The petitioner maintains that the only issue that is "Superfluous" is the opposition of the district attorney as he is sending a message to the Court of Appeals and the reviewing Federal District Court and this court must not condone these actions by a court officer. Therefore, the opposition should be dismissed as frivolous and devoid of any merit.

TONY BENNETT Pro-se

Sworn to before me the 5th
day of July, 1995

Paul W. Sargent
Notary Public

TO: District Attorney
Queens County
125-01 Queens Boulevard
Kew Gardens, N.Y. 11415

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF QUEENS:
CRIMINAL TERM: PART L-5

----------x

THE PEOPLE OF THE STATE OF NEW YORK,	:	INDICTMENT # 842-83
-against-	:	
TONY BENNETT,	:	
Defendant.	:	CAL. CALL

----------x

25-10 Court Square
Long Island City, NY
November 30, 1995

B E F O R E :

HON. TIMOTHY FLAHERTY, J.S.C.

A P P E A R A N C E S :

HON. RICHARD A. BROWN, ESQ.
District Attorney, Queens County
BY: ROBERT VALLI, ESQ.

KAREN L. FLAHERTY
Senior Court Reporter

COURT CLERK: Recall on number one, 842 of '83, Tony Bennett.

MR. VALLI: Robert Valli for the People.

I had spoken to your law secretary by phone and conferred we would rely on the decision or response that we had previously made. I think he informed me the Court would make a decision based on that response.

THE COURT: Yes. The motion is denied.

* * *

THE FOREGOING IS A TRUE AND ACCURATE RECORD OF THE PROCEEDINGS.

_____

KAREN FLAHERTY
Official Court Reporter